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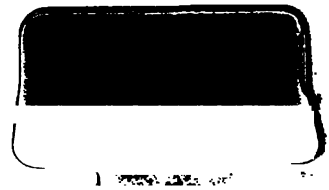
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A

# PRACTICAL TREATISE

ON THE

# LAW OF LEGACIES.

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By WILLIAM SCOTT PRESTON, Esq.

OF LINCOLN'S-INN.

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TO

THE RIGHT HONORABLE

# ROBERT LORD GIFFORD,

*BARON GIFFORD, OF SAINT LEONARD,*

IN THE COUNTY OF DEVON,

MASTER OF THE ROLLS,

&c. &c. &c.

*THIS BOOK*

IS,

BY HIS LORDSHIP'S PERMISSION,

AND

WITH UNFEIGNED RESPECT

FOR HIS ACKNOWLEDGED TALENTS AND ADMIRED URBANITY,

DEDICATED,

BY HIS VERY HUMBLE AND OBLIGED SERVANT,

*THE AUTHOR.*

# ADVERTISEMENT.

## TO THE READER.

THE Subject of the following pages, is of such frequent occurrence, and so important in practice, that the Author has been induced to give it his attention, sincerely, yet with diffidence hoping, to render his labours useful. Practical utility has been aimed at; and if in the attempt to state the result of the numerous, and often conflicting Authorities, with the utmost conciseness, the Author may at times have rendered his meaning obscure, he must throw himself on the indulgence of the Public. The Cases cited in the Work have been carefully and repeatedly examined, and it is with some confidence trusted, that they will, in general, be found to support the propositions for which they are adduced; but on a subject of so much

difficulty, no expectation is formed, of the Work being free from error. In order to give ready access to the numerous points, which occur in the Treatise, copious Indexes of the Cases, and of the Subject-matter, are added. Before closing this Address, the Author begs publicly to acknowledge his thanks, to his Friend *James Pringle Barclay*, Esq., of Lincoln's-Inn, for his valuable assistance, afforded during the progress of the work, through the press.

7, *Lincoln's-Inn*,
21 *June* 1824.

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A

# PRACTICAL TREATISE,

*&c*

## CHAP. I.

IN treating of Legacies, it will be necessary to inquire, who are capable,

1st. Of devising real estate; or, which is of equal importance, of charging the same with legacies:

2ndly. Of bequeathing personal property.

First, by the common law, and after the introduction of the feudal system, lands were not devisable (*a*), except by special custom (*b*).

In the reign of Henry 7. (*c*), power was first given by law (a power which had previously been

(*a*) *Wyndham* v. *Chetwynd*, 1 Burr. 420; *Warren* v. *Lee* cited Dyer, 127, b; *Ex parte the Earl of Ilchester*, 7 Ves. 370; Co. Litt. 111, b; 271, b. n.; 231, s. 8; 1 Roll, 608, pl. 45; Abr. 69, pl. 20. 25; *Browne* v. *Brokes*, 2 Sid. 154; Brooke Abr. title Devise, pl. 20; *Periman's Case*, 5 Co. 84; *Gawen* v. *Ramtes*, Cro. Eliz. 804; 2 Black. Com. 373.

(*b*) Co. Litt. 111; 1 Roll.

(*c*) 7 Hen. 7, c. 3.

exercised through the medium of trusts and courts of equity) to those engaged in this king's wars to make feoffments to the uses of their wills; and by the 3 Hen. 8, c. 4, it was enacted, "that every person who was or should be (engaged) in the king's wars, beyond, or on the seas, should have protection of '*profecturus*,' or moraturus cum *clausula* volumus:' and that he might alien his lands holden in capite without licence; and if he died in that service, his heir within age and in ward, his executors, feoffees or assigns, should have the wardship and marriage, towards the performance of his *will*:" and by the 14th & 15th of the same reign, c. 14, power was given "to those in the king's service, in the wars, to alien their lands for the performance of their wills, without any fine for alienation;" and by the 32 Hen. 8, c. 1, it was enacted, "that every person *having* or who should *have* any manors, &c. holden in socage, or of the nature of socage tenure, and *not having* any manors, &c. holden of the king by knight's service, by socage in chief, or of the nature of socage tenure in chief, nor of any other person or persons by knight's service, should, from the 20th day of July 1540, have full and free liberty, power and authority, to give, dispose, will and devise, by his last will and testament, *in writing*, all his manor, &c. or any of them, at his free will and

pleasure, reserving to the king his rights," &c.: and by the same act, s. 3, power was given to dispose of two-thirds of such manors, &c. or the value of two-thirds in severalty, as were held in chief, or otherwise, of the king or other person, by knight's service, or in the nature of knight's service, for the advancement of a wife, preferment of children, payment of debts, or *otherwise*, at the will and pleasure of the testator; reserving to the king, or other lord, his rights over the remaining one-third part, and his fines for alienation over the *whole*. By the 34 & 35 Hen. 8, c. 5, s. 4, the last act was *explained* to empower those only who were seised *in fee simple*, either in severalty, in coparcenary, or in *common*, and to such person only, to the extent in which he was interested, or, as the statute expresses it, "inasmuch as in him is or shall be;" and the 14th s. in explanation of the common law (*d*), declared, that such will or testament of any lands, by a woman covert, or person within the age of twenty-one, or by any person non sanæ memoriæ, shall not be taken to be good or effectual. By the 12 Car. 2. c. 24, all tenures by knight's service in chief, and by socage in chief, and other

(*d*) *Paulet Marq. of Winchester's Case*, 6 Co. 23; *Sir George Caverly's Case*, Dyer, 354; 1 Roll. Abr. 608, pl. 8; *Brooke* v. *Gatty*, 2 Atk. 34.

tenures, with their incidents (except copyhold tenure, and tenures in frank almoign, and the honorary services of grand serjeantry,) were taken away, and reduced to common socage, thereby giving the acts of 32. 34 & 35 Hen. 8, full and complete operation over every species of real property, of freehold tenure, of which the owner was seised in fee, and could, previously to the last statute, have disposed, had they been of the tenure of common socage. Still to the devise of lands it was necessary the devisor should be seised *in fee*, and that the lands should be of *socage tenure* (*e*). By the stat. of 29 Car. 2, c. 3, s. 12, the power of devising was extended, by enabling tenants, pour autre vie, to dispose of their estates *by will*, in the same manner as they might give their estates in fee simple; but lands of *copyhold* tenure were not *devisable* by the common law, nor generally by custom; and by the stat. 12 Car. 2, c. 14, s. 7, lands of this tenure were expressly excluded from the operation of that statute. By custom, however, these lands were transferrable by surrender, and through the medium of trusts, which, as to copyhold lands, were not affected by the statute of uses (*f*),

(*e*) *Gawen* v. *Ramles*, Cro. Eliz. 804.

(*f*) 27 Hen. 8, c. 10; Co. Litt. 111, b, n. 1; *Tuffnel* v. *Page*, 2 Atk. 37.

these lands became subject to a person's will, by a surrender upon such trusts as he should appoint by will: the will, therefore, operated as a declaration of trust, and bound the lands in the hands of the heir and of the lord, as effectually as if the same lands had been of socage tenure, and had been devised in conformity with the statute of wills. A surrender, however, was only necessary to bind the *legal* estate of copyholds; therefore, a person who had only an *equitable* estate in copyholds, might in equity bind such estate, without a surrender to the use of his will. *Tuffnell* v. *Page*, 2 Atk. 37; and equity, which acts on the conscience of persons, obliged the collateral heir for the benefit of the peculiar objects of the court of equity, viz. wife (*g*), children (*h*) and creditors (*i*), to surrender copyholds to the uses of his ancestor's will, even where such ancestor died seised of the legal fee.

In favour of a wife or children, however, the copyholds must have been expressly mentioned, or intention disclosed to pass them, by the will; yet it was held sufficient, if the devise were a general *devise*, to warrant courts of equity in supplying a surrender for the benefit of creditors (*k*).

(*g*) *Watts* v. *Bullas*, 1 P.W. 60.
(*h*) *Fielding* v. *Winwood*, 16 Ves. 90; *Bradley* v. *Bradley*, 2 Vern. 163.
(*i*) *Haslewood* v. *Pope*, 3 P.W. 322.
(*k*) *Harris* v. *Ingledew*, 3 P.W. 96; *Church* v. *Munday*, 12 Ves.

Now by the stat. of 55 Geo. 3, c. 192, which is prospective only, the necessity of a surrender of copyholds to the use of a will is, in most cases, rendered unnecessary.

When commerce produced activity, and required capital to perform its operations, alienation commenced; and from the year 1676, it may be said, all persons have been enabled to dispose of real estate, or to charge the same by will, with the exceptions following; viz. 1. *Married women*, who are expressly excepted by the stat. 34 & 35 Hen. 8, c. 5, and who were considered, by the common law, under the influence of their *husbands*, and therefore not sufficiently unbiassed to have the power of disinheriting their heirs, as to freehold lands; even though their husbands consented to such devise (*l*): nor can a custom, even as to copyhold lands, for a married woman to devise without the consent of her husband, be supported (*m*). The wife of a man banished for life, by act of parliament, becomes, in consideration of law, a feme sole, and may, therefore, devise her lands (*n*). By

430; *Judd* v. *Pratt*, 13 Ves. 168; *Sampson* v. *Sampson*, 2 Ves. & B. 340; *Kidney* v. *Coussmaker*, 12 Ves. 136.

(*l*) *Hearle* v. *Greenbank*, 2 P.W. 712; Preston's Shep. T. 402, s. 4; Ambl. 627; Co. Litt. 112, b.; 4 Co. 61, b.

(*m*) Moore Rep. 123, pl. 268; *Stivens* v. *Tyrrel*, 2 Wilson Rep. 1.

(*n*) *Countess of Portland* v. *Plodgers*, 2 Vern. 104; *Compton* v. *Collinson*, 2 Bro. C. C. 385.

way of trust, or by means of a power which operated as a trust before the statute of uses (*o*), and now as an use by that statute, a married woman may acquire the means of disposing of real estate by *will* (*p*).

*Infants* are also expressly excepted out of the stat. of 34 & 35 Hen. 8, and cannot devise by reason of their want of discretion (*q*): though an infant may, it is said, devise by custom (*r*), if of sufficient discretion (*s*). In calculating the age of an infant, his birth-day must be reckoned inclusive (*t*); and no attention is paid to the hour of birth, since in law there is not any fraction of a day (*u*); and an infant cannot, it should seem, be enabled by means of a power, to pass any interest in *his* real estate (*x*).

The incapacity extends to all persons of unsound mind; and under this description are included, madmen, idiots (*y*), persons grown

(*o*) 27 Hen. 8, c. 10; *Peacock* v. *Monk*, 2 Ves. S. 191.

(*p*) *Southby* v. *Stonehouse*, 2 Ves. S. 610; Co. Litt. 112, b; *Hearle* v. *Greenbank*, 3 Atk. 711; *Cotter* v. *Layer*, 2 P. W. 624.

(*q*) *Hearle* v. *Greenbank*, 3 Atk. 710, *et seq.* Hobart, 225.

(*r*) Perk. 221, s. 504; sed vide Cro. Eliz. 805.

(*s*) *Hearle* v. *Greenbank*, 3 Atk. 711; sed quære, and *vide* note 11 to 403, of P. Shep. Touch. where this point is denied.

(*t*) *Herbert* v. *Torbal*, 1 Sid. 162; S. C. Sir Tho. Raym. 84.

(*u*) *Anon.* Salk. 44; *Sir Robert Howard's Case*, 2 Salk. 625.

(*x*) *Hearle* v. *Greenbank*, 3 Atk. 697.

(*y*) Swinb. 111; P. Shep. T. 403. 412.

childish by reason of old age, or distemper; persons drunk (*z*); persons born deaf, dumb, and blind, who are considered as idiots (*a*); and persons under duress (*b*). In *Mountain* v. *Bennet*, 1 Cox, 354, it is clearly stated, that it is not necessary a person should be insane, to deprive him of the power of devising; but that, if he be not of a sound and disposing mind, his will, made during the continuance of such incapacity, will be ineffectual (*c*).

Traitors are incapable of devising, because their lands are forfeited to the crown, on judgment given (*d*); but, after pardon, such persons may devise subsequently acquired lands (Preston's Shep. T. 434); and their wills, it should seem, are good against their representatives, though void as against the crown (P. Shep. Touch. 404). Felons may devise *lands*; the forfeiture for felony not extending to the inheritance. P. Shep. Touch. 404, sed quære (*e*). Vide also P. Shep. Touch. 412, where it is doubted whether the will of a felon is not revoked by the *crime*. And other persons are enumerated in

(*z*) Swinb. 112; P. Shep. T. 421.

(*a*) 1 Inst. 42, b.

(*b*) *Putbury* v. *Trevelian*. Dyer, 143, b.

(*c*) P. Shep. T. 403. 412; 3 Bro. C. C. 441; *Ridgway* v. *Darwin*, 8 Ves. 65; *Niel* v. *Morley*, 9 Ves. 478; *Ex parte Cranmer*, 12 Ves. 445; *Ex parte Smith*, Swanst. 6.

(*d*) Co. Litt. 391, a; Co. Litt. 2, b; *Page's Case*, 5 Co. 52.

(*e*) Co. Litt. 2, b; *Page's Case*, 5 Co. Rep. 52.

P. Shep. Touch. 404, as being incapacitated; such as libellers, &c. who are not, it is apprehended, disabled by our law, *by* reason of such *crimes*.

Tenants in tail, as such, cannot devise, because their power of alienation ceases on their deaths, and the estate descends on their heirs in tail, who claim per formam doni, and in effect under the original grantor.

Joint-tenants, while such, cannot devise, because they are excluded by the construction of the stat. 34 & 35 Hen. 8, as also by the common law; and because, on their death, their surviving companion in the joint-tenancy claims anterior to their will, and by the original grant (*f*).

Corporators are prohibited from devising *lands* of which they are seised in their corporate capacity, because they hold in right of the corporate body, and their estate devolves on their successors.

Lastly, *aliens* (*g*) cannot devise, because they cannot, whilst they continue aliens (P. Shep. T. 403), purchase lands for their own benefit (*h*); and they cannot acquire lands either by descent or otherwise by act of *law*, even for the benefit of the king (*i*); and on their death the *same* lands shall devolve to the king (*k*).

Secondly, the right of bequeathing personal

(*f*) 1 Inst. 185.

(*g*) 1 Inst. 2, b.

(*h*) Litt. 2, b.

(*i*) *Calvin's Case*, 7 Co. Rep. 18, b; 25, b.

(*k*) *Page's Case*, 5 Co. Rep. 52, b.

property has existed from all time (*l*), and mention is expressly made of this power by the 9 Hen. 3, c. 18, anno 1225; no restraint having been put on the disposition of this kind of property, from the disregard with which it was treated, and because, until later times, this species of property was not very considerable in amount. By custom, however, till a late period, the inhabitants of York were restrained from disposing of their *personal* property (*m*).

According to the better opinion, males of the age of fourteen years, and females of the age of twelve years, may bequeath personal estate (*n*); these being the ages at which the civil law (*o*) has allowed bequests of this property; and our law, in interests of this nature, follows the civil code (*p*). Various ages have, however, been noticed, at which discretion for this purpose commences. 2 Black. Comm. 497.

The exceptions to the last foregoing rule are, married women, who cannot even dispose of their chattels without the consent of their husbands; because, by law, all the personal

(*l*) 111, b. Co. Litt. n.; s. 1.

(*m*) *Somerville* v. *Ld. Somerville*, 5 Ves. 790. See stat. 4 W. & M. c. 2, and 2 & 3 Anne, c. 5.

(*n*) *Ex parte Holyland*, 11 Ves. 11 Inst. 89, b; *Smallwood* v. *Brickhouse*, 2 Mod. 315; Swinb. 114.

(*o*) 2 Mod. 315; *Hanson* v. *Graham*, 6 Ves. 243; P. Shep. Touch. 403, n. 12; *Hearle* v. *Greenbank*, 1 Ves. S. 303; 1 Inst. 351, a; n. 304.

(*p*) Ibid.

property of the wife, of which the husband can acquire possession, vests, by her marriage, in him (*q*); and though he give *his wife* leave to bequeath personalty, he may revoke such leave, by forbidding the probate of her will after her death. (P. Shep. Touch. 411, n. 1.) Even a woman's choses in action devolve to her husband by her death in his lifetime; and he may, by administering to his wife, become entitled to them (*r*). An administrator de non bonis, of the wife, will also be a trustee for the representatives of the surviving husband (*s*); but if the husband die in his wife's lifetime, her choses in action remain her property.

Where a bequest was to *A.*, wife of *B.*, payable twelve months after the decease of the testatrix; the testatrix died, and *B.* died more than a year after the testatrix, having by his will disposed of the legacy to his wife before it was paid; it was held, that being a chose in action it survived to *the wife* (*t*): notwithstanding *B.* received the interest, and a *fund*, (a chose in action),

(*q*) *Macauley* v. *Philips*, 4 Ves. jun. 18; *Beresford* v. *Hodson*, 1 Madd. 373; Roll. Abr. Devise (A.) pl. 8. ib. pl. 9. 40; *Rich* v. *Hill*, 9 Ves. 369.

(*r*) 29 Car. 2, c. 3, s. 25; *Macauley* v. *Philips*, 4 Ves. jun. 19; *Freeman* v. *More*, 3 Bro. P. C. 378; *Fettiplace* v. *Georges*, 1 Ves. jun. 46.

(*s*) *Squib* v. *Wyn*, 1 P. W. 378; *Elliot* v. *Collier*, 3 Atk. 526; 2 Ves. 15, S. C.; 11 Vin. Abrid. 88, pl. 24.

(*t*) *Blount* v. *Bestland*, 5 Ves. 516.

was in the lifetime of *B.* agreed to be appropriated to answer this legacy.

If the wife have a separate estate she may dispose of such estate, without the consent of her husband (*u*); because, as to such property, she is, in the consideration of law, a feme sole (*x*): so *à fortiori*, she may dispose of the savings of such separate estate (*y*). A separate estate may arise to a married woman, either by express declaration, or by directing that her receipt may be a good discharge, or by giving the sum or bequest for her livelihood (*z*), or by a direction to pay the same into her hands: but a bequest of interest to a married woman simply, does not exclude her husband (*a*); nor does a gift for her own use and benefit (*b*). *Roberts* v. *Spicer*, 5 Mad. 491. By industry and frugality, also, a married woman may acquire a separate estate, if her husband desert her for a length of time (*c*).

(*u*) *Buck* v. *Milnes*, 2 Ves. jun. 488; *Hulme* v. *Tenant*, 1 Bro. C. C. 18; *Norton* v. *Turville*, 2 P. W. 144; Swinb. Wills. 156; *Tappenden* v. *Walsh*, 1 Phill. Rep. 354; *Heatley* v. *Thomas*, 15 Ves. 596; note (n) to 134; Tho. Co. Litt.

(*x*) *Peacock* v. *Monk*, 1 Ves. S. 191; *Fettiplace* v. *Georges*, 1 Ves. jun. 46; *Rich* v. *Hull*, 9 Ves. 375.

(*y*) *Bletson* v. *Sawyer*, 1 Vern. 244; *Slanning* v. *Style*, 3 P. W. 338; *Gore* v. *Knight*, 2 Vern. 535.

(*z*) *Hartley* v. *Harle*, 5 Ves. 545.

(*a*) *Lumb* v. *Milnes*, 5 Ves. 521.

(*b*) *Lee* v. *Priaux*, 3 Bro. C. C. 381; *Wills* v. *Sayers*, 4 Mad. Rep. 409.

(*c*) *Cecil* v. *Juxon*, 1 Atk. 278.

Power may also, by settlement or will, be reserved or given to a married woman to dispose of personal property (*d*): and she may bequeath goods and chattles which she has as executrix *in trust*, without the consent of her husband (P. Shep. T. 402), because such property would otherwise go to the next of kin of the original *testator*, in a course of *administration* (*e*). Her paraphernalia, however, do not constitute part of her separate estate, *as such*, though as against legatees she has a prior right to the *same*. They are (with the exception of such part as may be separate property) liable to the debts of her husband; though the husband's real estate, if charged with debts, shall be applicable primarily (*f*), so as to secure to the wife her paraphernalia.

Persons (*g*) insane, and all persons falling under that class, labour under an incapacity of bequeathing personal property, except during lucid intervals, because they have not any disposing mind.

Traitors, and felons—convict, and outlaws, are also under a disability, because their goods

(*d*) *Randall* v. *Hearle*, 2 Anstr. 363; Co. Litt. 351, n. 304, s. 6.

(*e*) Swinb. 154. 7 Mod. 148; 1 P. Shep. T. 403, n. 7.

(*f*) *Tipping* v. *Tipping*, 1 P. W. 730; *Snelson* v. *Corbet*, 3 Atk. 369; *Graham* v. *Londonderry*, ib. 395; *Burton* v. *Pierrepont*, 2 P. W. 79; *Northey* v. *Northey*, 2 Atk. 77.

(*g*) *White* v. *Driver*, 1 Phill. Rep. 85. See note (*c*) p. 8.

and chattels are forfeited by reason of their crime (*h*).

Joint-tenants, if they continue so till their death, are disqualified, because their interest on their death survives, and is determined by their death, and consequently nothing remains to be disposed of. An alien friend may acquire personal property, and bequeath the same. 2 Roll. Rep. 94. Com. Dig. Alien, [C.] 7. But an alien enemy forfeits all his personalty to the crown, if advantage of such forfeiture be taken during the continuance of such hostility. *Antoine* v. *Morshead*, 6 Taunt. 239. On declaring war, says Mr. Hargrave, in a note to Co. Lit. 129, b. the king usually qualifies such declaration by permitting the subjects of the enemy resident here, to continue so long as they peaceably demean themselves; and without doubt such persons, during such time, are to be deemed alien friends.

*The next consideration will be, What is a sufficient will to charge real estate with legacies?* Originally, lands that were deviseable by custom did not require any ceremony (*i*) to give effect to such devise. P. Shep. Touch. 407; nor did the stat. 32, or the stat. 34 & 35 of Hen. 8, invalidate the custom, or require any

(*h*) 1 Inst. 391, a; P. Shep. T. 405. ib. 499; 1 Inst. 185.

(*i*) Co. Litt. 111, b.

ceremony to the devise of those lands. By the 32 Hen. 8, c. 1, writing was made essential to a devise under that statute; and this was the only restriction imposed: even if a testator declared his will *by word*, and the same will was reduced into writing by another in the lifetime of the testator, it was a sufficient compliance with the statute (*k*). Signing was not necessary by that statute, and the name of the testator might be averred (*l*). In the case of Sir Francis Worsley, parol evidence *was admitted*, and allowed to be given by the framer of the will, after he had released the several interests which he took under that will. As the law then stood, persons in the agonies of death were easily persuaded to make their wills, and great scope was necessarily left for fraud. By a statute (*m*), commonly styled the statute for the prevention of frauds and perjuries, it was enacted, "that after the 24th June 1676, all devises and bequests of any lands or tenements, *devised* either by force of the statute of wills, or by that statute, or by force of the custom of Kent, or the custom of any borough, or any other particular *custom*, shall be *in writing*, and signed by the

(*k*) 3 Lev. 79, pl. 120; Dyer, 72, a, pl. 2; P. Shep. T. 405, 406, 407; *Putby* v. *Trevelian*, Dyer, 143, a.

(*l*) *Dine* v. *Munday*, 1 Sid. 362; *Sir Francis Worsley's Case*, 1 Siderf. 315; S. P. 3 Lev. 79, pl. 120.

(*m*) 29 Car. 2, c. 3, s. 5.

party so devising the same, or *some other person* in his *presence*, and by his express direction, and shall be attested and subscribed in the presence of the devisor, by three or four credible witnesses, else *such wills* shall be utterly void and of no effect.

The requisites by this statute to charge lands are, therefore,

1. Writing:

2. Signature by the testator, or by some other person in his presence, and by his direction.

It is observable, that this act of signature may be in any part of *the will* (*n*). Sealing, though formerly deemed a sufficient signature (*o*), is not now considered signing within the statute (*p*); the acknowledgment, however, by the testator, of his hand-writing, is sufficient (*q*).

3. Attestation, } by three or more credible
4. Subscription, } witnesses.

The attestation is by law applicable to the fact of the testator's sanity at the time of his signing (*r*). It is necessary the whole will should be before the testator at the time of such attes-

(*n*) 1 Eq. Cas. Abr. 403.

(*o*) *Lemayne* v. *Stanley*, 3 Lev. 1.

(*p*) *Doe* v. *Peach*, 2 Maul. & Sel. 580; *Smith* v. *Evans*, 1 Wil. 313; *Ellis* v. *Smith*, 1 Ves. jun. 11; *Wright* v. *Wakeford*, 17 Ves. 459.

(*q*) *Stonehouse* v. *Evelyn*, 3 P. W. 253.

(*r*) *Harris* v. *Ingledew*, 3 P. W. 93; *Ex parte Ilchester*, 7 Ves. 367; *Paulet Marquis of Winchester's Case*, 6 Co. Rep. 23.

tation (*s*); it is likewise necessary that the testator be so far present, as to be enabled to *see* the witnesses subscribe (*t*); and such presence is both at law and in equity, construed to mean *mental* presence, or knowledge of the fact of attestation (*u*). Subscription by a mark is a good signature, within the meaning of the statute (*x*): such signature and attestation may be at different times (*y*), the testator at the time either signing, or acknowledging his hand writing; which, as before observed, is equivalent to signature (*z*).

Publication is, in the eye of the law, also necessary to the due execution of a will (*a*); but it is not necessary that such publication should be expressly by a person *as his will*, since if it be in terms delivered as a deed, it will be operative, and be a due publication as a will (*b*). Acknowledgment by the testator of his hand-

(*s*) *Lea* v. *Libb*, 3 Mod. 263; 1 Eq. Cas. Abr. 403.

(*t*) *Doe* v. *Thanifold*, 1 M. & S. 294; *Broderick* v. *Broderick*, 1 P. W. 239; 1 Eq. Cas. Abr. 403.

(*u*) *Right* v. *Price*, 1 Doug. 24; *Chetwynd* v. *Wyndham*, 1 Burr. 423; *Ex parte Ilchester*, 7 Ves. 370.

(*x*) *Addy* v. *Grix*, 8 Ves. 185; S. P. *ibid.* 504.

(*y*) *Gryle* v. *Gryle*, 2 Atk. 177, & cas. cited n. (1); *Smith* v. *Ellis*, 1 Ves. J. 11.

(*z*) *Stonehouse* v. *Evelyn*, 3 P. W. 253.

(*a*) *Ross* v. *Ewer*, 3 Atk. 161.

(*b*) *Habergham* v. *Vincent*, 4 Bro. C. C. 352; *Passmore* v. *Passmore*, 1 Phill. 216.

writing, will also be a due publication Though the requisites of the statutes do appear on the face of the will, yet if they h been complied with, and proof can be addue sufficient to satisfy a jury of that fact, it sufficient (*d*).

It is observable the stat. of 29 Car. 2, c. does not extend to copyhold lands, nor annuities in fee, nor to customary lands, wh are not devisable without a surrender to the of a will: but it does extend to custom lands, which are devisable without a surren to the use of a will (*e*).

It may be remarked, that all persons exc those who are infamous, as perjured persons, t the like, and such as want understanding judgment; as children, infants, and the like, good witnesses (*f*). The wife of an executor an executor not taking any beneficial inte under the will, is a good witness (*g*): but a versionary interest, given to the wife of a witn disqualifies such witness, so far as relates to wife's interest, even though his wife died bef

(*c*) *Stonehouse* v. *Evelyn*, 3 P. W. 253; *Longford* v. *Eyre*, 1 P. W. 741; Dyer, 143, b.

(*d*) *Ellis* v. *Smith*, 1 Ves. jun. 11; *Lord Rancliffe* v. *Parkins*, 6 Dow. Parl. Rep. 202.

(*e*) P. Shep. T. 434.

(*f*) P. Shep. T. 409; *Wi ham* v. *Chetwynd*, 1 Burr. 4

(*g*) *Phipps* v. *Pitcher* Taunt. 220.

her estate became an estate in possession. *Hatfield* v. *Thorp*, 5 Barn. & Ald. 589. But to render the evidence of witnesses, who are legatees, or devisees, credible, it has by statute been enacted (*h*), that all witnesses shall forfeit the interest to which they otherwise would have been entitled, under the will to which they are witnesses, whether the will relates to real or personal estate, (the latter of which does not require any witness (*i*);) a debtor, however, does not lose his debts by being a witness (*k*). As legacies are fluctuating in amount until the testator's death, a *general* charge of legacies by a will duly executed to pass land, will in analogy to a charge of debts, be sufficient to charge the land with all such legacies as the testator *may* give, notwithstanding some be mentioned by a *paper* dated subsequent to the will; and that paper be not duly attested to pass land (*l*). A paper expressly referred to by a will, shall be taken as part thereof, though not *attested*, provided the same be written before the execution of the will (*m*).

(*h*) 25 Geo. 2, c. 6.

(*i*) *Lees* v. *Summergill*, 17 Ves. 509.

(*k*) *Wyndham* v. *Chetwynd*, 1 Burr. 427. 430.

(*l*) *Harris* v. *Parker*, Ambl. 556; *Chetwynd* v. *Wyndham*, 1 Burr. 423; *Brudenell* v. *Boughton*, 2 Atk. 274; *Masters* v. *Masters*, 1 P. W. 423; *Habergham* v. *Vincent*, 2 Ves. J. 231; *Smart* v. *Prujean*, 6 Ves. 560; *Hooper* v. *Goodwin*, 18 Ves. 166.

(*m*) *Wilkinson* v. *Adam*, 1 V. & B. 446.

For, says Lord Eldon (*n*), "if the produce
"estate is to be disposed of, you must sh
"instrument, in effect *executed* by the te
"in the presence of three witnesses, an
"dencing from its own contents, that it
"in a sense: even if no attestation is anne
"it. The rule of law is, that an instrumen
"perly *attested*, in order to incorporate a
"*instrument not attested*, must *describe* it
"to be a manifestation of what the pape
"be incorporated, in such a way that the
"cannot be under any mistake."

The charge may be, and frequently is, ever, expressly confined to the legacies by the will (*o*).

The foregoing doctrine must be confi those cases in which the land is merely the *ary fund* for payment of legacies (*p*); for a cannot reserve to himself a power by w charge legacies on land by an unattested because such a reservation would be in opposition to the statute of the 29 C c. 3, s. 5 (*q*).

(*n*) *Smart* v. *Prujean*, 6 Ves. 565.

(*o*) *Howe* v. *Medcalfe*, 1 Bro. C. C. 261; *Bonner* v. *Bonner*, 13 Ves. 379.

(*p*) *Brudenell* v. *Boughton*, 2 Atk. 272.

(*q*) *Masters* v. *Masters*, 1 P. W. 422; *Wyndham* wynd, 1 Burr. 423; *Ha* v. *Vincent*, 2 Ves. *Sheddon* v. *Goodrick*, 481; *Rose* v. *Cunningl* Ves. 29; *Hooper* v. *G* 18 Ves. 166.

But that the charge may attach on real estate, in addition to the necessity of the will conforming in all respects to the statute of wills, the *intention* must be clear and plain (*r*): therefore, where a testator commenced his will by saying: —As to all my worldly *estate*, I dispose of the same as follows, after my debts and legacies paid; (then after giving several legacies the testator added): After my legacies paid, I *give* the *residue* of my personal estate to my son; and then devised to him a *real* estate, and appointed him one of two executors; it was held the first *clause*, was so explained by the bequest of the residue of the personal estate, that the real estate was not well charged with legacies (*s*). The same doctrine was also held, where the real estate was specifically devised (*t*).

A different construction has been made with regard to debts (*u*), a general charge in the commencement of the will, being in favour of creditors, sufficient to charge the realty, even

(*r*) *Knightley* v. *Knightley*, 2 Ves. J. 332; *Davis* v. *Gardiner*, 2 P. W. 188.

(*s*) *Gardiner* v. *Davis*, 2 P.W. 187.

(*t*) *Knightley* v. *Knightley*, 2 Ves. jun. 332; *Williams* v. *Chitty*, 3 Ves. 545; *Smallcrop* v. *Finden*, 3 Ves. 739; *Powell* v. *Robins*, 7 Ves. 209; overruling *Trott* v. *Vernon*, Prec. Ch. 430; S. C. 2 Vern. 708.

(*u*) *Knightley* v. *Knightley*, 2 Ves. J. 332; *Smallcrop* v. *Finden*, 3 Ves. J. 739; *Keeling* v. *Brown*, 5 Ves. 362; notwithstanding a dictum in *Williams* v. *Chitty*, 3 Ves. 550.

devised (*p*). The intention to charge the real estate, is collected from the circumstance of the devisee being also made executor: as in *Brudenell* v. *Boughton*, 2 Atk. 297. The testator in that case commenced his will, by giving all his worldly estate; and then after giving legacies, he gave the remainder of his estate (real, at a particular place), and all his freehold and personal estate, not before disposed of, after payment made of his just debts and *legacies*, to *A.* whom he appointed *executor*. The legacies were held well charged on the *real* estate.

So in *Tompkins* v. *Tompkins*, Precedents in Chancery, 397, the bequest was, "after my debts and legacies paid, I give, &c." and the real estate was held charged. The same rule prevailed also, where the *heir at law* was both devisee and the surviving executor, at the time the legacy bequeathed was claimed (*q*). Again, where the heir at law was both *devisee* and *executor*, and *drew* the testator's *will*, by which the testator directed his executor to see his will performed (*r*); it was held that the real estate was well charged. So where a bequest was to a daughter, to be paid

(*p*) *Godolphin* v. *Pennock*, 2 Ves. S. 271; *Harris* v. *Incledon*, 3 P. W. 96; *Bowdler* v. *Smith*, Prec. Ch. 264; contra *Powell* v. *Robins*, 7 Ves. 209.

(*q*) *Dean* v. *Mellor*, 5 Term Rep. 562.

(*r*) *Alcock* v. *Sparhawk*, Vern. 228; *Powell* v. *Robins*, 7 Ves. 211.

one month after the decease of the testator's wife, to whom the testator gave a life interest in his real and personal estate, with the reversion to *his son*, whom he also made *executor*; the personalty being deficient, the real estate was held liable, though not charged by express words (*s*).

Again, where a testator gave a life estate to his wife, in his real and personal estate, and after her decease, gave various legacies, with the residue over; the realty was held to be well charged: the testator considering the fund, in the construction of the court, as *entire* (*t*). The inference of intention to bind the land also arose, where the whole personalty was given away, and the real estate was limited to one for life, with limitations over; and a bequest was given twelve months after the remainder-man of the real estate came into possession (*u*). Again, where a testator devised estates for life, with the reversion in fee to *A*, charged with 100*l.* a-piece to his six nieces, to be paid them respectively twelve months after the testator's decease; it was held that the charge extended over the whole real estate, and was not confined to

(*s*) *Lypet* v. *Carter*, 1 Ves. S. 500.

(*t*) *Brudenell* v. *Boughton*, 2 Atk. 270; *Bench* v. *Biles*, 4 Madd. Rep. 188.

(*u*) *Miles* v. *Leigh*, 1 Atk. 575; *Walker* v. *Walker*, 2 Atk. 625.

the reversion in fee; and the same legacies were decreed to be raised at the end of a year from testator's decease, with interest at 4 per cent. till raised (*x*). It is observable that if the fund has once borne the charge, it shall not again be subject to it, though the money raised be misapplied (*y*); and if a particular fund be charged, which fails, the legatee will not have any relief (*z*). Where the land is devised, or the rents and profits thereof are devised, for payment of debts and legacies, a sale may be made under the authority of the Court of Chancery, though not where they are directed to be paid out of the annual rents and profits (*a*). Copyhold lands are expressly excepted out of the stat. of 12 Car. 2, c. 24, s. 7, because lands of this tenure were not generally devisable by custom, nor by the common law. To give validity to a transfer, or conveyance of lands of this tenure, a surrender was at law, as to the legal estate (*b*), absolutely necessary; and when a surrender was made, a trust might be declared of such surrender even by *parol:* but since the Statute of Frauds, 29 Car. 2,

(*x*) *Carter* v. *Carter*, 1 Ves. S. 169.

(*y*) *Oldfield* v. *Oldfield*, 1 Vern. 336; *Ivy* v. *Gilbert*, 2 P.W. 20; *Omerod* v. *Hardman*, 5 Ves. 736.

(*z*) *Choats* v. *Yates*, 1 Jac. & Walk. 102.

(*a*) *Anon.* 1 Vern. 104; *Boughton* v. *Brudenell*, 2 Atk. 272; *Bootle* v. *Blundell*, 1 Meriv. 233.

(*b*) *Tuffnell* v. *Page*, 2 Atk. 37.

c. 3, s. 7, a *writing* is absolutely requisite, as every trust to be valid must, by that Statute, be reduced into *writing*. A paper, in the nature of a will, does as to copyholds operate as a mere declaration of trust (*c*), which has relation to the time of the surrender, so as to avoid all *mesne* acts (*d*). Surrenders were, however, supplied, as before observed, in equity, in favour of the peculiar objects of that court; and persons who had only the equitable estate might have devised the same without such surrender. By the statute of 55 Geo. 3, c. 192, which is prospective only, a surrender to the use of a will, even by a person having the legal estate in copyholds, is rendered unnecessary. For the devise of lands of this tenure, therefore, a simple writing is sufficient, and all other ceremonies may be disregarded; though the Master of the Rolls doubted, whether an equity in copyholds, ought not to have been attested by three witnesses to pass such interest (*e*).

As to the requisites to pass personal property.

By the 19th sect. of the Stat. of Frauds (*f*), it is enacted, that after the 20th of June 1676, no

(*c*) *Tuffnell* v. *Page*, 2 Atk. 37; *Doe* v. *Danvers*, 7 East, 299; *Habergham* v. *Vincent*, 4 Bro. C. C. 353; *Carey* v. *Askew*, 1 Cox, 242.

(*d*) *Benson* v. *Scott*, 1 Salk. 185; 12 Mod. 49, S. C.; *Tuffnell* v. *Page*, 2 Atk. 37; *Carey* v. *Askew*, 1 Cox, 244.

(*e*) *Wagstaffe* v. *Wagstaffe*, 2 P. W. 259.

(*f*) 29 Car. 2, c. 3.

*nuncupative* will shall be good, where the estate bequeathed shall exceed the value of 30*l.* that is not proved by the oaths of *three witnesses* that were present at the making thereof; nor unless it be proved that the testator at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor unless such *nuncupative* will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling; or where he, or she, had been resident for the space of ten days, or more, next before the making of such will; unless where such person was surprized, or taken sick, being from his home, and died before he returned to the place of his or her dwelling. By the 20th section it is enacted, that if six months pass after speaking of the pretended testamentary words, no testimony shall be received to prove any such will, except the testimony, or the *substance* thereof, were committed to writing within six days after making the said will; (but this act does not extend to soldiers in *actual* service, nor to mariners *on the sea.*) But as the requisites prescribed by the stat. of 29 Car. 2, c. 3, as to lands, do not relate to chattels real or personal (*g*), (except to a term attendant on

(*g*) *Walker* v. *Walker*, 1 Meriv. 515; Co. Litt. 111, b.

the inheritance, which is in equity considered part thereof, and to the devise of which three witnesses are requisite (*h*),) a paper, if written, signed, or acknowledged by the testator, is sufficient for the bequest of personal property, without attestation (*i*), even where the personalty has been previously bequeathed by a will duly attested to pass land, and by which will the realty was charged in aid of the personal estate with payment of debts and legacies (*k*). The handwriting of the testator, however, must be proved. P. Shep. Touch. 408. Legacies, though charged on lands by a devise *duly executed and attested*, may be varied or revoked by a subsequent will unattested (*l*), because the personal estate, is still the primary fund, for this purpose. To the bequest of stock, however, two witnesses are necessary by statute law (*m*); but, on a bequest of stock, by an unattested will, the executors would

(*h*) *Whitchurch* v. *Whitchurch*, 2 P. W. 236; *Beauchamp* v. *Earl of Hardwicke*, 5 Ves. 285.

(*i*) *Carey* v. *Askew*, 1 Cox, 242; *Gawler* v. *Standewick*, 2 Cox, 16; P. Shep. T. 406. n. (21); *Thwaites* v. *Smith*, 1 P.W. 13, n.; 1 Swinb. 300; *Lunberry* v. *Mason*, Comyns' Rep. 451; *Coxe* v. *Bassett*, 3 Ves. J. 160.

(*k*) *Coxe* v. *Bassett*, 3 Ves. J. 163.

(*l*) *Wyndham* v. *Chetwynd*, 1 Burr. 423; *Rose* v. *Cunningham*, 12 Ves. 29; *Hooper* v. *Goodwin*, 18 Ves. 167; *Attorney-General* v. *Ward*, 3 Ves. J. 331; *Holford* v. *Wood*, 4 Ves. 90.

(*m*) *Bank of England* v. *Lunn*, 15 Ves. 569; 1 Geo. 1, c. 19, s. 12; 30 Geo. 2, c. 19, s. 49; 35 Geo. 3, c. 14, s. 16.

it is apprehended, be trustees for the legatees (*o*). As no particular form is prescribed by the several statutes, to the validity of a will, a deed may operate as a testamentary disposition, if a sufficient intention be disclosed for this purpose, and provided it have the requisites prescribed by law to the validity of a will (*p*); and notwithstanding delivery of the instrument as a *deed* (*q*). Buller, J. in *Habergham* v. *Vincent*, 2 Ves. J. 230, says, a will operates only from the death of the testator; and an instrument in any form, whether a deed-poll, or indenture, if the obvious purpose is not to take place till after *the death* of the person making it, shall operate as a will; and a voluntary bond for the payment of a sum of money, after the death of the obligor, is in the nature of a legatory disposition (*r*). Such a deed, to operate as a will, must be perfected (*s*); and instructions to a solicitor

(*o*) *Ripley* v. *Waterworth*, 7. Ves. 425.

(*p*) *Carey* v. *Askew*, 1 Cox, 421; *Metham* v. *Duke of Devon*, 1 P. W. 530; *Habergham* v. *Vincent*, 4 Bro. C. C. 352; S. C. 2 Ves. J. 204.

(*q*) *Green* v. *Proud*, 1 Mod. 117; *Wyndham* v. *Chetwynd*, 1 Burr. 421; *Habergham* v. *Vincent*, 2 Ves. J. 230; *Thorold* v. *Thorold*, 1 Phill. Rep. 1; *Rigden* v. *Vallier*, 2 Ves. 252.

(*r*) *Ramsden* v. *Jackson*, 1 Atk. 292; *Drakeford* v. *Wilkes*, 3 Atk. 540.

(*s*) *Griffin* v. *Griffin*, cited 4 Ves. 197; *Walker* v. *Walker*, 1 Mer. 515; *Windsor* v. *Platt*, 2 Brod. & Bing. 650; P. Shepep. Touch. 408; *Wood* v. *Wood*, Phill. Rep. 370; *Rymer* v. *Clarkson*, 1 Phill. 32.

were held a sufficient disposition of personal property, the *testatrix* writing to her solicitor, "*this you have under my hand if any thing happens before the writing is drawn up* (*t*)." It is observable also, that a will may be of several parts (*u*), and written at different times (*x*). Legacies may arise by virtue of a power, in exercise of which, strict observance is to be paid to the forms, if any, prescribed for the valid execution of the power (*y*); therefore a general power to appoint by deed, cannot be exercised by a will, though a power to appoint by any writing, or instrument, may be exercised by a will (*z*); and a power to appoint by will generally, is well executed by a writing in the nature of a will (*a*).

A general power to appoint personalty, by deed or will *b*, may be exercised by a will sufficiently and properly executed to pass personal estate (*c*). So where a power was given to *A.* to

(*t*) *Haberfield* v. *Browning*, cited 4 Ves. 200; *Carey* v. *Askew*, 1 Cox, 241.

(*u*) *Chalton* v. *Griffin*, 1 Burr. 549.

(*x*) *Brudenell* v. *Boughton*, 2 Atk. 273; *Cobbold* v. *Bias*, 4 Ves. 200.

(*y*) *Wright* v. *Wakeford*, 4 Taunt. 213; S. C. 17 Ves. 459; *Doe* v. *Pearse*, 6 Taunt. 402.

(*z*) *Pulteney* v. *Darlington*, Cowper, 260.

(*a*) *Driver and Berry* v. *Thompson*, 4 Taunt. 294.

(*b*) *Maddison* v. *Andrew*, 1 Ves. S. 60.

(*c*) *Duff* v. *Wilson*, 1 Bro. C. C. 147; *D. of Marlborough* v. *Ld. Godolphin*, 2 Ves. S. 77.

charge an estate, in settlement, with 300*l.*, to be divided as *A.* should by his will *duly* executed appoint, an appointment by a will attested by two witnesses was supported (*d*). Any ceremony to the valid execution of a power may be required at the discretion of the donor of the power (*e*); though a person cannot reserve to himself a power of disposing or charging real estate, otherwise than authorized by the statute of 29 Car, 2, c. 3 (*f*).

Powers must be strictly pursued, for they are construed strictly; thus a power to appoint to children, does not authorize an appointment to grand-children (*g*); but after an appointment to objects *not* within the power, a limitation over, may be good, if made to an object of the power, and to take effect within the period limited against perpetuities *h*). A power to appoint to issue does include grand-children, and other

(*d*) *Jones* v. *Clough*, 2 Ves. S. 368.

(*e*) P. Shep. T. 407; *Ross* v. *Ewer*, 3 Atk. 156.

(*f*) *Longford* v. *Eyre*, 1 P. W. 74; *Habergham* v. *Vincent*, 2 Ves. J. 204.

(*g*) *Alexander* v. *Alexander*, 2 Ves. S. 642; *Pitt* v. *Jackson*, 2 Bro. C. C. 50. 235; *Maddison* v. *Andrew*, 1 Ves. S. 59; *Robinson* v. *Hardcastle*, 2 Bro. C. C. 22. 343; *Butcher* v. *Butcher*, 9 Ves. 382; S. C. 1 Ves. & B. 100; *Robinson* v. *Hardcastle*, 2 Term Rep. 244; S. C. 2 Bro. C. C. 22; Sugd. on Powers, 343. 500; overruling *Devon* v. *Cavendish*, cited in 4 Term Rep. 744, n.

(*h*) *Cromper* v. *Barrow*, 4 Ves. 685.

more remote issue (*i*), as does a similar power in favour of descendants (*k*). Again, a power to appoint to children of an intended marriage, does not extend to children of a future marriage (*l*). By way of settlement, the share of a child, may, with the consent of husband and wife, (the latter being the appointee, and object of the power,) be settled so as to include grandchildren (*m*). Though it is not absolutely necessary, yet it is prudent, in exercising a power, to recite it (*n*); and it is necessary that there should be a reference, either to the power, or to the fund subject to the power (*o*); therefore the bequest of a residue, or the appointment of an executor, is not sufficient of itself to pass a fund, over which the testator has a power, as distinguished from an interest (*p*), even though there be a deficiency of assets (*q*). The specific bequest of personalty over which the testator has a power, but not any interest, will, however, operate as an appoint-

(*i*) *Hockley* v. *Mawbrey*, 1 Ves. J. 150; *Whyte* v. *Thurlston*, 3 Ves. 421.

(*k*) *Butler* v. *Stratton*, 3 Bro. C. C. 367.

(*l*) *Goodtitle* v. *Weal*, 2 Wils. 369.

(*m*) *White* v. *St. Barbe*, 1 Ves. & B. 399

(*n*) *Molton* v. *Hutchinson*, 1 Atk. 559.

(*o*) *Ex parte Caswell*, 1 Atk. 559; *Surman* v. *Surman*, 1 Taunt. 289.

(*p*.) *Buckland* v. *Barton*, 2 H. Black. 136.

(*q*) *Andrews* v. *Emmott*, 2 Bro. C. C. 301.

ment (*r*). Wherever the requisites prescribed by a power are conformed to, and the person exercising the power could not otherwise pass the interest, or fund specified, the will shall operate as an execution of the power (*s*).

As to personalty, the court cannot look to the circumstances of the testator, or admit evidence of his intention to pass the fund, subject to the power (*t*).

It may be observed, that a court of equity will supply a defect in the execution of a power, in favour of the peculiar objects of equity (*u*); but equity cannot relieve, against the non-execution of a power (*x*). An appointment of a fund by will, is at any time revocable by the testator, even by deed; since a will is in its very nature revocable, either partially or *in toto* (*y*); insomuch so, that there are not any means under the sun to bar a man of this liberty. P. Shep. T. 401. Interests limited in default of appointment are vested (*z*); but where *A.* has a mere authority

(*r*) *Surman* v. *Surman*, 1 Taunt. 289.

(*s*) *Dillon* v. *Cavanagh*, 2 Sch. & Lef. 464; *Dillon* v. *Dillon*, 1 B. & B. 77. 92.

(*t*) *Jones* v. *Curry*, 1 Swanst. 72.

(*u*) *Harvey* v. *Harvey*, 1 Atk. 562; *Bradley* v. *Westcote*, 13 Ves. 452.

(*x*) *Arundel* v. *Philpot*, 2 Vern. 69.

(*y*) *Lisle* v. *Lisle*, 1 Bro. C. C. 533.

(*z*) *Tynham* v. *Webb*, 2 Ves. S. 208; *Vanderzee* v. *Aclam* 4 Ves. 784.

to appoint, though amongst specified objects, no interest is vested until an appointment is effectually made, without such a limitation in default of appointment (*a*). If a power be to appoint amongst children, and in default to a child, if only one, and if more amongst all the children, equally, and there is only one child, such child shall take under the limitation, and not by virtue of the power (*b*), as being the better title. The power will, however, operate, if it be exercised, and thereby give to the child a right of enjoyment, or other benefit, *prior* to the period at which the limitation would be called into operation. As to the priority of an interest arising under the exercise of powers, it depends on the power in the original deed. The moment a power is exercised, it is the same as if the limitation, made under the power, had been inserted in the original deed giving the power (*c*); so that a subsequent power first exercised, may be partially or altogether defeated, by the subsequent exercise of a prior power. Where a residue was directed to be divided amongst children, as they should *deserve*, it was held this gave a power of ap-

(*a*) *Maddison* v. *Andrew*, 1 Ves. S. 60; *Butcher* v. *Butcher*, 1 Ves. & B. 100; *Jones* v. *Curry*, 1 Swanst. 71.

(*b*) *Bellasis* v. *Uthwaite*, 1 Atk. 427.

(*c*) *Mosley* v. *Mosley*, 5 Ves. 258.

pointing unequal shares (*a*). So where the power was to give such fortunes as *A.* should think proper, and her children should deserve, an appointment to one child (who was provided for) of one guinea was supported (*b*). A power to charge a gross sum, implies a power to raise interest likewise (*c*). It is also observable, that a power to appoint to "*such*," or to and amongst such children, &c. authorizes an exclusive appointment to one (*cc*); though under a power to appoint amongst (*d*), or to all and every, &c. *each* child must have a portion of the fund. As to what are effective executions of such powers in equity, by reason of the *quantum*, considerable difficulty exists, and each case must depend on its own circumstances, and the inducements of parents, and the situation and behaviour of children (*e*). Shares, most unequal, have been supported as valid executions of such powers.

An appointment may be good in part and void for the excess only, as an appointment to a child for life, remainder to grand-children

(*a*) *Muspratt* v. *Gordon*, 1 Anst. 35.

(*b*) *Burrell* v. *Burrell*, Ambl. 660.

(*c*) *Boycot* v. *Cotten*, 1 Atk. 515.

(*cc*) *Wollen* v. *Tunner*, 5 Ves. 220.

(*d*) *Spring* v. *Biles*, 1 T. [illegible] 432; *Doe* v. *Alchin*, 2 Bar[illegible] & Ald. 122.

(*e*) *Burrell* v. *Burrell*, Amb[illegible] 660; also *Butcher* v. *Butch[illegible]* 1 Ves. & B. 100; where [illegible] cases are collected, and co[illegible] mented on by Lord Eldon.

where the power is to appoint among children only (*f*). It may further be observed, that a general power, giving a beneficial interest, if executed in favour of a volunteer, will be assets to pay the debts of the appointor (*g*).

Having seen who may devise and bequeath, and by what means, it may be observed, that every thing to which a person is *beneficially* entitled, may be devised or bequeathed. Even possibilites coupled with an interest, as distinguished from mere rights or titles, are devisable (*h*). As the statute empowers those only *having* lands, &c. it may be remarked, that lands purchased after making the will do not pass without a republication of that will; and not even then, unless the language of the will or codicil be sufficiently comprehensive to embrace such after-purchased lands (*i*). Lands contracted for, and not conveyed, will, *in equity*, pass by a will made after such contract, and before a conveyance taken (*k*), and may therefore be charged with legacies. A codicil, to be a republication of a will relating to lands, must be made in conformity to the Statute of Frauds.

(*f*) *Palmer* v. *Wheeler*, 2 Ball & Beatt. 28; *Adams* v. *Adams*, Cowp. 651.

(*g*) *Holmes* v. *Coghill*, 7 Ves. 499; S. C. 12 Ves. 206.

(*h*) *Roe* v. *Jones*, 1 Hen. Black. 31; *Manning's Case*, 8 Co. Rep. 94; *Lampet's Case*, 10 Co. Rep. 46.

(*i*) *Strathmore* v. *Bowes*, 7 Term Rep. 482.

(*k*) P. Shep. T. 438.

Copyhold lands, however, purchased after the date of a will, will pass by a subsequent surrender "to *uses declared*, or to be declared by my will (*l*)."

## *Of Legatees.*

ALL persons are capable of taking as legatees, either for their own benefit, or for the benefit of another person, provided there be a sufficient certainty in the description of the legatee; for want of which it was formerly held, a bastard could not be a legatee before he was born, because his reputation commenced from his birth (*a*). Various distinctions have been made on this subject, which will be enumerated in the chapter, on the description of legatees. Other persons are said to be incapable of taking as legatees, by reason of certain crimes and misdemeanors. P. Shep. Touch. 414. It is apprehended exclusions, from such causes, must be confined to the civil law.

## *Of the Duty of the Executor.*

BY the appointment of an executor, an universal heir, or representative, is chosen of all the

(*l*) *Heylin* v. *Heylin*, Cowp. 132.

(*a*) 1 Co. Litt. 3, b. n. 1; *Metham* v. *Duke of Devon*, 1 P. W. 529.

personal estate (*b*), of which the testator shall be possessed at his decease (*c*); and the ecclesiastical court, through which the executor's authority is affirmed, has not any power to grant probate, or otherwise to interfere with a will, except so far as it concerns the personal estate (*d*). An executor may, nevertheless, be a trustee,

1. For payment of debts:

2. For payment of legacies, and other purposes of the will: and therefore, although the ecclesiastical courts have jurisdiction over legacies (*e*), yet where there is a trust, equity will, if requisite, interfere: trusts being a creature of, and cognizable only in, equity (*f*).

It may here be remarked, that the general rule for the application of the testator's property, in discharge of his debts, is

1. His personalty;
2. Lands expressly charged by the will;
3. Lands descended; and under this class

(*b*) Swinb. p. 14. 30. 32. 45; Com. Dig. Adm. [B.]6; *Hinton* v. *Foye*, 1 Atk. 466; *Hinton* v. *Pinke*, 1 P. W. 540; *Oke* v. *Heath*, 1 Ves. S. 141; *Walker* v. *Jackson*, 2 Atk. 627; P. Shep. Touch. 475. 477; *Turner* v. *Turner*, 1 Jac. & Walk. 45; *Attorney General* v. *Ward*, 3 Ves. 331; *Holford* v. *Wood*, 4 Ves. 90; *Phillips* v. *Bignel*, 1 Philli. Rep. 240.

(*c*) *Attorney General* v. *Bowyer*, 5 Ves. 303.

(*d*) *Habergham* v. *Vincent*, 2 Ves. J. 230; Swinb. 53.

(*e*) *Taylor* v. *Diplock*, 2 Philli. Rep. 272; Swinb. 49. and (n.)

(*f*) *Anon.* 1 Atk. 491.

are included, estates *pour autre vie*, by stat. 29 Car. 2, c. 3, s. 12;

4. Lands *devised*.

But lands devised, subject to mortgages, and expressly charged with them, by the will, shall exonerate lands descended from the payment of the mortgage debts (*g*).

A trader's real estate is liable, both to simple and specialty debts, by stat. 47 Geo. 3, c. 74, if he continue in trade to the period of his death (*h*), without a general charge for this purpose. Real estate in the West Indies is also liable to debts, without any charge by the will (*i*). It has been held that turnpike tolls are real estate (*k*); and it has been decided that grants out of the 4½ per cent duties on the post-office revenues are personal estate, because these revenues themselves are not real estate (*l*): but money secured by an assignment of poor and county rates has been considered real estate (*m*). Toll *traverse* and petty customs are considered realty; and are nothing more than rents, for using that which

(*g*) *Walker* v. *Jackson*, 2 Atk. 624; vide also *Evelyn* v. *Evelyn*, 2 P. W. 659, and n.; *Oxford* v. *Rodney*, 14 Ves. 417.

(*h*) *Keene* v. *Riley*, 3 Mer. 436.

(*i*) *Manning* v. *Spooner*, 3 Ves. J. 118.

(*k*) *Knapp* v. *Williams*, 4 Ves. 542; *House* v. *Chapman*, 4 Ves. 430, n.

(*l*) *Aubin* v. *Daly*, 4 Barn. & Ald. 59; *Buckridge* v. *Ingram*, 2 Ves. J. 661.

(*m*) *Finch* v. *Squire*, 2 Ves. 41.

is either the king's, or the property of the public (*n*). And shares in the New River have been held real estate; but the nature of the property in these shares, is usually regulated by the special act of parliament.

The personal estate may indeed be exonerated from the payment of debts (*o*), in case another and sufficient fund be provided for this purpose (*p*): but to exonerate the personal estate from debts, a *clear* intention must be manifested; or such an *apparent* and necessary demonstration must be disclosed, by the whole will taken together, as will leave no doubt on the mind of the judge of such intention. Thus, where the whole *personal* estate was given away to a wife, an executrix, and the real estate was given to trustees in trust to pay debts, and to divide the *residue or surplus* amongst testator's brothers and sisters (*q*). Again, where (*r*) the real estate was devised to be sold, and the produce *after paying debts*, was to be divided between the testator's *heir at law*, and

(*n*) *Buckridge* v. *Ingram*, 2 Ves. J. 663.

(*o*) *Ancaster* v. *Mayer*, 1 Bro. C. C. 453, and vide n.; *Howe* v. *Lord Dartmouth*, 7 Ves. 149; *Hastlewood* v. *Pope*, 3 P. W. 325, and n. (2).

(*p*) *Tower* v. *Lord Rous*, 18 Ves. 132; *Bootle* v. *Blundell*, 1 Mer. 193; *Gittins* v. *Steele*, 1 Swanst. 29; *Joy* v. *Campbell*, 1 Sch. & Lef. 339.

(*q*) *Wyndham* v. *Bamfield*, Prec. in Ch. 101; *Attorney General* v. *Ward*, 3 Ves. 331; *Holford* v. *Wood*, 4 Ves. 90.

(*r*) *Wainwright* v. *Bendlowes*, 2 Vern. 718.

his brothers, and the residue of the *personalty* was given away, it was held the real estate was in each case primarily liable: the circumstances of each case disclosing a sufficient inference in the minds of the judges who decided those cases, that the personal estate was to be exonerated by the real estate (*s*). So where the realty was charged by the will, and the personalty was given to the executors by a codicil, the personal estate was held to be exempt (*t*); but this case has been disapproved. In later cases, wherever the personal estate is given to an *executor*, the presumption of exonerating the personal estate loses its weight; and objections have been made to the residue being exonerated, because the construction of law is, residue after payment of debts (*u*). Nor is the residue of the personalty bequeathed, *exempt* from debts, even where a testator charged all his property with debts, and afterwards devised his real estate, and part of his personal estate, upon trust to pay them (*x*). Though all the personalty be given to *A.* who is not appointed executor, yet if the real estate is likewise *devised* without being

(*s*) *Bootle* v. *Blundell*, and cases there cited and enumerated, in 1 Mer. 231.

(*t*) *Jackson* v. *Walker*, 2 Atk. 627.

(*u*) *Tait* v. *Lord Northwick*, 4 Ves. 824; *Hartley* v. *Hurle*, 5 Ves. 540; *Tower* v. *Lord Rous*, 18 Ves. 138.

(*x*) *Hartley* v. *Hurle*, 5 Ves. 540.

expressly charged, the personalty must be primarily applied (*y*).

Even a direction for sale of real estate to satisfy debts, funeral expenses, and legacies; and a further direction that the legacies should be paid as soon as the sale should take place, has been held insufficient to exonerate the personal estate from debts (*z*).

Where a testator devised his real estate, and gave several legacies, and directed they (*i.e.* the *legacies*), should be paid out of his real estate, and gave his personalty to his children, it was held the realty should not be liable to the testator's *debts*, because not expressly charged (*a*). It has been held, that if the personalty is given to one, and the real estate is charged with payment of debts, and the *residue* of the *real estate* is likewise given to the legatee of the personalty, the inference of exonerating the personalty ceases, even though the residue of the realty is limited in tail (*b*), or for life only, with a limitation to the legatee's issue in strict settlement (*c*). It is said, however, in *Tower* v. *Lord Rous*,

(*y*) *Heath* v. *Heath*, 2 P. W. 266.

(*z*) *M'Cleland* v. *Shaw*, 2 Sch. & Lef. 542.

(*a*) *Heath* v. *Heath*, 2 P. W. 366; *Brydges* v. *Phillips*, 6 Ves. 571; *Hartley* v. *Hurle*, 5 Ves. 540.

(*b*) *Hastlewood* v. *Pope*, 3 P. W. 324.

(*c*) *Protheroe* v. *Brummell*, 3 Ves. J. 113; *French* v. *Chichester* 1 Bro. P. C. 192.

18 Ves. 140, the circumstance of the residu legatee being the first taker of the real estate, been sometimes held a ground for (*qu.* not) exempting the personal estate. In *Green Green*, 4 Madd. 157, the bequest was to a tator's wife of all the personal estate to separate use, except such part as he the test should specifically give, either by his will, o any codicil, and the testator devised his estate (subject to the payment of his debts funeral expenses) upon trust to sell, and ou the money to pay all debts on mortgage, b and simple contract, and *also* his funeral *penses*, and the expense of proving his will, after payment, &c. then on trust, &c. to in the surplus and pay the interest to his wife for and the wife was appointed one of the execut with the trustees; and it was held the pers estate should be exempt from the paymen debts, and this case was followed in the ca *Mitchell* v. *Mitchell*, 5 Madd. 72.

It has also been said (*d*), where real and le hold estates are devised to different pers from the executors, on trust to sell for payn of debts, legacies, and funeral expenses, and

(c) *Watson* v. *Brickwood*, 9 Ves. 447; *Beatle* v. *Blundell*, 1 Meriv. 223.

(d) *Burton* v. *Knelton*, 3 109.

residue of the personal estate not *before specifically* given, is given to the executor, upon trust for such persons as the testatrix should appoint, and in default, to her; the presumption is, that the testatrix did intend to exonerate her personal estate. However, in *Aldridge* v. *Wallscourt*, 1 B. & B. 316, the real estate was devised to trustees, charged with debts, funeral expenses, and portions, and *all* the personalty was given to an executor, on *trust* for such purposes as testator should appoint, and the testator by *will* did appoint all his personalty to his daughter; nevertheless, notwithstanding the trustees and executor were different persons, or at least the lands were devised to *trustees*, and all the personalty was given to *an executor* in trust, yet the personal estate was held primarily liable. It is to be observed, that a bequest upon trust to discharge all testator's debts, for which at the time of his death he (the testator) had not given real securities, will impliedly amount to a discharge of his personal estate, to the extent to which real securities had been given (*e*). The inference of exemption again arises where a testator directs his real estate to be *sold*, and the *residue* to sink into his *personal estate*, which he bequeaths: such direction being incompatible

(*e*) *Waring* v. *Ward*, 5 Ves. 676.

with the application of the personalty (*f*). And where there was an estate devised for the express purpose of paying both a mortgage debt, and raising a sum by way of portion, notwithstanding the personal estate was given subject to debts and legacies, yet the personal estate was held to be exonerated from those express charges of mortgage and portion; being, in effect, a declaration that the real estate should be exclusively burthened with those charges (*g*).

And wherever the real estate is made liable to the payment of such expenses, as exclusively regard the *administration* of the personal estate; such as the costs of *probate*, and other costs sustained in the execution of the will, an implied intention to exonerate the personalty arises (*h*). If an estate be devised expressly charged with a *particular* legacy or portion, the devisee must take the estate with its burthen, and has not any claim to be relieved by those entitled to the personalty (*i*). Again in *Gittins* v. *Steele*, 1 Swanst. 25, where there was a general direction for payment of debts and legacies, and then the

(*f*) *Webb* v. *Jones*, 2 Bro. C. C. 60; though this case was disapproved in 1 B. & B. 316.

(*g*) *Hancox* v. *Asbey*, 11 Ves. 184.

(*h*) *Bootle* v. *Blundell*, 1 Mer. 239.

(*i*) *Heath* v. *Heath*, 2 P. W. 366; *Ward* v. *Dudley*, 2 Bro. C. C. 317.

testator bequeathed 7,000*l.* to *A*, and charged his freehold and leasehold estates with the payment of that sum, afterwards the testator devised his real estate upon trust to sell and pay his debts, legacies, &c. then testator bequeathed his personal estate on the same trusts to pay certain legacies, and all other legacies (except the legacy of 7,000*l.*) which he stated was to be considered charged on, and paid out of, the *money* arising by sale of his real and leasehald estates; it was held, the 7,000*l.* was charged on the real estate only, notwithstanding part of that fund had been sold by the testator before his death, and the residue was insufficient to answer the 7,000*l.*

From the foregoing cases, it is difficult to say what will amount to an exemption of the personal estate, unless a case resemble any of those already decided, or unless the personal estate is *expressly* exempted by the testator. The court will not, however, look out of the will to ascertain the testator's intention (*k*), implied from the state of his affairs, nor to circumstances existing at the time of making his will (*l*); and though the personalty may be expressly exempted in favour of a particular

(*k*) *Brummell* v. *Protheroe*, 3 Ves. 113; *Brydges* v. *Phillips*, 6 Ves. 572.

(*l*) *Sibley* v. *Perry*, 7 Ves. 527; *Attorney General* v. *Grote*, 3 Mer. 320.

person, if that person cannot enjoy the intended benefit, the exemption ceases (*m*).

As to the order in which debts ought to be paid, see P. Shep. Touch. 477, n. (53).

## *Of the Executor's Assent.*

As the executor is the representative of the testator, in regard to the whole personal estate, and as every article of this kind devolves on him in this character, upon trust, in the *first place*, to discharge the testator's *debts*, his assent is therefore essential to the validity of every bequest to arise from the personal estate, whether general or specific; because the personal estate may be wanted for payment of debts (*n*).

Assent may be given before probate (*o*), Com. Dig. Admin. [B.] 9; though probate is the only *evidence* of a will, in respect to the persona

(*m*) *Hale* v. *Cox*, 3 Bro. C. C. 322; *Waring* v. *Ward*, 5 Ves. 676.

(*n*) 1 Swinb. 33. 37. and notes; *Ewer* v. *Corbet*, 2 P. W. 149; *Bunting* v. *Stonard*, 2 P. W. 150; 1 Inst. 111, b; *Mead* v. *Lord Orrery*, 3 Atk. 238; *Farrington* v. *Knightley*, 1 P. W. 554; *Hinton* v. *Pinke*, 1 P. W. 540; *Bronsdon* v. *Winter*, Ambl. 58; *Andrew* v. *Wrigle*y, 4 Bro. C. C. 124; *Bank* of *England* v. *Moffat*, 3 Bro. C. C. 262; *Bank of England* v. *Lu*n, 15 Ves. 581; *Chalmer* v. *Bra*dley, 1 Jac. & Walk. 64; P. Shep. T. 455, n. (15.) 474. 47.

(*o*) Dyer, 367, a; *Middleto*n's *Case*, 5 Co. Rep. 27; *Smit*h v. *Mills*, 1 Term Rep. 480.

estate. P. Shep. T. 409; Swinb. 47; *Taylor* v. *Diplock*, 2 Phill. Rep. 272. The assent of one of several executors, or the representative of the testator for the time being, is sufficient (*p*). Such assent may be presumed from an appropriation for the legatee, by an executor (*q*); and if an executor owns that the money is lying ready for a legatee, it is an assent, and admission of assets (*r*). If a bequest is made to executors, they paying a rent to *I. S.* and they pay the rent, it is an assent to the whole legacy (*s*).

An assent may be implied by the executors taking a release or grant from the legatee, since without *assent* the acts done to the executor would be nugatory (*t*). P. Shep. T. 450. 458. Such a presumption does not, it should seem, arise from an executor's leasing a chattel, of which he is both legatee for a partial or particular interest, and executor; nor by his entry on such lease, if he take a *partial* interest: but otherwise if he take the absolute interest; because in the former case he *may* be liable for

(*p*) P. Shep. T. 454, 455. 485; *Westley* v. *Clark*, 1 Eden, 357; Com. Dig. Admin. [C.] 8.

(*q*) *Bank of England* v. *Lunn*, 15 Ves. 582.

(*r*) *Hawkes* v. *Saunders*, Cowp. 293.

(*s*) P. Shep. T. 457; Com. Dig. Admin. [C.] 6.

(*t*) *Pierce* v. *Adams*, 3 P.W. 11; *Garret* v. *Lister*, 1 Lev. 25; 1 Roll. Ab. 619. 920; *Paramour* v. *Smart*, Plowd. 544; Com. Dig. Admin. [C.] 6.

a *devastavit*, but cannot in the latter case (*u*); for an assent to a particular interest is likewise an assent to those in remainder (*x*). Slight circumstances will amount to an assent (*y*). And assent may be given on a condition precedent, though not to defeat the gift on the happening of a future event, or on a condition subsequent; since when assent is once given, the legatee becomes absolutely entitled (*z*). No person can be an executor before twenty-one years of age, by stat. 38 Geo. 3, c. 87, s. 6. Indeed an infant's assent could not be of any avail, as an infant could not, by the common law, do any thing that might tend to his own injury.

A feme covert cannot assent to a legacy (*a*), by reason of her husband's liability for any *devastavit* she may occasion, his concurrence is therefore necessary; indeed she cannot, without her husband's consent, accept the *office* of executrix. Assent when given has relation to

(*u*) *Hayes* v. *Sturges*, 7 Taunt. 217; P. Shep. T. 456; Dyer, 277, b. pl. 59; Toller's Ex. 346; Com. Dig. [C.] 5.

(*x*) *Adams* v. *Pierce*, 3 P. W. 12; *Hayes* v. *Sturges*, 7 Taunt. 217; Swinb. 40, et seq.

(*y*) *Noel* v. *Robinson*, 2 Vent. 358; P. Shep. T. 456; Com. Dig. Adm. [C.] 6; *Lampet's Case*, 10 Co. 52.

(*z*) *Russell's Case*, 5 Co. 27 Com. Dig. Adm. [C.] 8; *Coleburne* v. *Bisestone*, 1 Leon. Rep. 129; P. Shep. T. 455, (14); 4 Co. Rep. 28, b. 817.

(*a*) Swinb. 44; *Russell's Case*, 5 Co. Rep. 27; P. Shep. 476. 486; 1 Roll. Ab. 618.

the time of the testator's death (*b*). Assent may be compelled in equity if there be sufficient assets (*c*); and by an admission of assets, the executor himself becomes in equity a debtor, to the legatee, to the amount of his legacy (*d*); by a promise to pay a legacy the executor makes himself liable to an action at law, though an action does not arise on an implied promise (*e*).

## CHAP. II.

### *Of General and Specific Legacies.*

LEGACIES may be considered under the two following divisions, viz.:

1. Those which are general, pecuniary, or of quantity; and,

2. Those which are specific.

The first class are payable out of the general personal estate after the discharge of the testator's debts (*f*), and are therefore, in case of deficiency of assets, liable to abate (*g*); or if paid, are in some cases to be refunded (*h*). If

(*b*) Wentw. Office of Ex. 249.

(*c*) *Day* v. *Trigg*, 1 P. W. 287; P. Shep. T. 459.

(*d*) *Jeffs* v. *Wood*, 2 P. W. 131.

(*e*) *Ewer* v. *Jones*, 2 Lord Raym. 934; *Childs* v. *Monins*, 2 Bro. & Bing. 460.

(*f*) *Cotterell* v. *Chamberlain*, Burnaby, 32; *Hinton* v. *Pinke*, 1 P. W. 540; *Bank of England* v. *Lunn*, 15 Ves. 580.

(*g*) Infra, Ch. "*Abatement.*"

(*h*) Infra, Ch. "*Refunding.*"

the personal estate, however, be exhausted specialty creditors, then such legatees sha equity generally stand in the place of these ditors, and be paid out of that fund to w such creditors might have resorted, after application of the personalty (*i*).

Legacies may, however, be charged on estate, either as the primary fund (*k*), or (w is generally the case) as a fund auxiliary to personal estate; and in all cases, unless ther an express provision, or necessary implicatic the contrary, the personal estate is the fund of which legacies are primarily payable (*l*); withstanding the real estate be devised in t to sell, to pay debts and specified legacie a term be created for this purpose (*m*).

The cases before cited, with reference t

(*i*) Infra, Ch. "*Marshalling of Assets.*"

(*k*) *Bamfield* v. *Wyndham*, Prec. in Chan. 101; *Howell* v. *Price*, 1 P. W. 292, and cases there cited in note; *Walker* v. *Jackson*, 2 Atk. 627; *Bootle* v. *Blundell*, 1 Meriv. 193.

(*l*) *Walker* v. *Jackson*, 2 Atk. 626, and cases there cited; 1 Meriv. 193, *ante*; *Minor* v. *Wickstead*, 3 Bro. C. C. 627; *Sumwell* v. *Wade*, 1 Bro. 144; *Attorney General* v. *Dowing*, Ambl. 571; *Tereyes* v. *Robertson*, Burr. 302; *Habergham* v. *Vincent*, 2 Ves. J. 237; *bury* v. *Brown*, 1 Ves. *Gawler* v. *Standiwick*, 2 Co *Lucy* v. *Gardner*, Burr. *Miles* v. *Leigh*, 1 Atk. *Burgoine* v. *Fox*, 1 Atk. *Lawson* v. *Hudson*, 1 Bro. 58; 2 Bro. C. C. 318; Com Ch. 3 [A.] 3; Ib. 4 [W.]

(*m*) *Gray* v. *Minnet* 3 Ves. 105; *Dudley* v. *D* 2 Bro. C. C. 317; *Spure Glynn*, 9 Ves. 483; *Wal Jackson*, 2 Atk. 626; *P* v. *Lord Rous*, 18 Ves. 132

exoneration of the personal estate from debts, are equally applicable to legacies; for to exempt the personal *estate* from payment of legacies, there must be as *clear* an intention disclosed, as is necessary in the case of debts, because debts and legacies, when given generally, are equally charged on the personal estate.

It may be again remarked, that land specifically devised, charged with a particular legacy, does amount, to the extent of such legacy, to an exoneration of the personal estate (*n*); for legatees and devisees are volunteers, and are not entitled to resort to any other than the particular fund, which the testator, or the law has assigned them. So where sums are given as *portions*, charged on lands, the personalty is not liable (*o*), although the personal estate is expressly charged with payment of debts and legacies; especially if the intention be that the personalty should accumulate (*p*). So the realty descended, charged with legacies generally, may be primarily liable, by a specific bequest of all the personalty (*q*), to one, who is not appointed an executor, and who does not take any interest in the estate

(*n*) *Gittins* v. *Steele*, 1 Swanst. 29; *Joy* v. *Campbell*, 1 Sch. & Lef. 339.

(*o*) *Reade* v. *Litchfield*, 3 Ves. 476.

(*p*) *Reade* v. *Litchfield*, 3 Ves. 477.

(*q*) *Buckridge* v. *Ingram*, 2 Ves. J. 666; *Green* v. *Green*, 4 Mad. 157; *Tower* v. *Lord Rous*, 18 Ves. 138.

legatees are entitled, after the assent of the executor (*d*); for these legacies vest on the death of the testator by the assent of the executor (*e*). Again, if particular funds are given generally by will, additions will pass with the *corpus* (*f*); and whether a *bonus* on funded property be given in money or stock (*g*), it will pass. In *Barclay* v. *Wainwright*, 14 Ves. 66, however, the dividend which was declared by the bank was held to belong to the tenant for life, because the court said, the bank had the *power* of making such a division of profit, if they pleased, by their charter. If bequests, certain or specified in quantity, are made: as I give the sum of 5,000 now standing in my name, a *bonus* in respect of that sum will not, it is said, pass with the stock, but must be considered as part of the residuary personal estate of the testator (*h*). The presumption, both of law and equity, is in favour of general legacies (*i*); unless it can be clearly

(*d*) *Kirby* v. *Potter*, 4 Ves. 751; *Raymond* v. *Broadbelt*, 5 Ves. 205.

(*e*) *Hinton* v. *Pinke*, 1 P. W. 540; *Bronsdon* v. *Winter*, Ambl. 58; *Kirby* v. *Potter*, 4 Ves. 751.

(*f*) *Pitt* v. *Jackson*, 2 Bro. C. C. 54; S. C. 3 Ib. 160; *Montgomerie* v. *Woodley*, 5 Ves. 537; *Brander* v. *Brander*, 4 Ves. 802; *Browne* v. *Groombridge*, 4 Madd. 495.

(*g*) *Paris* v. *Paris*, 10 Ves. 185; *Clayton* v. *Gresham*, 10 Ves. 289; *Down* v. *Atkins*, 2 P. W. 382.

(*h*) *Norris* v. *Harrison*, 2 Madd. 279.

(*i*) *Ellis* v. *Walker*, Ambl. 310; *Simmons* v. *Wallace*, 4 Bro. C. C. 349; *Attorney G*

ascertained by the will, that the testator intended to confer on the legatee some article, of which he was, at the time of making his will, possessed (*j*); and it was said by the Master of the Rolls, in *Kirby* v. *Potter*, 4 Ves. 751, that "Whenever there is a legacy of a given *sum*, there must be positive proof that it does not mean sterling money, in order to make it specific;" and Lord Eldon, in *Sibley* v. *Perry*, 7 Ves. 530, thus expresses himself: "The inclination of courts has been indulged to such an extent, in order to avoid legacies being disappointed in substance, and they have been so anxious to procure the legatees the bounty in some cases, that they have construed words giving the specific *corpus*, as a direction to *purchase* that thing." A few examples will be given as a guide to distinguish between these different bequests. And first, the bequest of a sum of money generally, or of a sum in government securities, must be taken as a bequest of quantity; or of so much money or so much stock, and falls under the first class (*k*); and this doctrine

*neral* v. *Parkin*, Ambl. 560; *Avelyn* v. *Ward*, 1 Ves. S. 425; *Chaworth* v. *Beech*, 4 Ves. 565; *Innes* v. *Johnston*, 4 Ves. 575; 1 Swinb. 244, *et seq*; *Sibley* v. *Perry*, 7 Ves. 530, n. (*a*); *Gillaume* v. *Adderley*, 15 Ves. 387, and cases there cited.

(*j*) *Parrot* v. *Worsford*, 1 Jac. & Walk. 601.

(*k*) 1 Swinb. 244, *et seq.*; *Bishop of Peterborough* v. *Mortlock*, 1 Bro. C. C. 566; *Ashton* v. *Ashton*, Cas. T. Talb. 152; S. C. 3 P. W. 384; *Avelyn* v. *Ward*, 1 Ves. S. 424; *Drinkwater* v. *Falconer*, 2 Ves. J. 625; *Partridge* v. *Partridge*,

prevails, notwithstanding the testator may have a greater, or the exact quantity of the specific stock, at the date of his will (*l*). In *Purse* v. *Snaplin*, 1 Atk. 413, where a testator bequeathed 5,000*l.* South Sea stock to *A.* and *B.* each, the testator having 5,000*l.* South Sea stock only at the time of making his will, the bequest was held general, and the executor was decreed to transfer the 5,000*l.* stock in moieties to *A.* and *B*, and to purchase 5,000*l.* more of the same stock, to be divided in the same manner; and the Master of the Rolls (Fortescue,) in commenting on this case in 3 Atk. 122, said, "If the bequest to one was *specific*, there was not any stock for the *other legatee*; and then as to him, it was a devise of stock where the testator had not any; and therefore a direction to the executor to procure it for the legatee." Nor is such a bequest rendered specific, by a direction to executors to keep so much capital in the same fund (*m*) as that, in which a bequest is given.

Cas. T. T. 227; *Hancock* v. *Horton*, 7 Ves. 399; *Chambers* v. *Minchin*, 4 Ves. 677; *Constantine* v. *Constantine*, 6 Ves. 103; *Sibley* v. *Perry*, 7 Ves. 529; *Deane* v. *Test*, 9 Ves. 146; *Wilson* v. *Brownsmith*, ib. 180.

(*l*) *Bronsden* v. *Winter*, Ambl. 59; *Simmons* v. *Wallace*, 4 Bro. C. C. 349; *Sibley* v. *Perry*, 7 Ves. 530; *Richardson* v. *Browne*, 4 Ves. 180; *Wilson* v. *Brownsmith*, 9 Ves. 180; overruling *Ashton* v. *Ashton*, 3 P. W. 386; *Mildmay* v. *Silwood*, 3 Ves. 310; *Jefferys* v. *Jefferys*, 3 Atk. 121.

(*m*) *Sibley* v. *Perry*, 7 Ves. 630.

The bequest of the produce of stock, to a certain amount, likewise falls under this class; the testator contemplating a sale of such portion of stock as will realize a certain quantity of money (*n*). Again, where money to arise from a particular debt (*o*), or from a particular fund (*p*), is appropriated as the fund to pay certain legacies, this does not alter the nature of the bequest; it is to be considered merely an appropriation of particular funds to answer general purposes; and if those sources fail, resort must be had to the general personal estate. A bequest out of my stock, as in *Morley* v. *Bird*, 3 Ves. 632, or so much of my funded property (*q*), or all the stock I shall die possessed of (*r*), falls under the same reasoning (*s*). Even where a bequest was to *A.* of the interest of 1,250 *l.* part of my stock in the four per cent, for life, together with the dividends due at my decease; and after the death of *A.* over; and the testator sold out all his four

(*n*) *Longdale* v. *Bovey*, 2 Anst. 571; *Kirby* v. *Potter*, 4 Ves. 750.

(*o*) *Ellis* v. *Walker*, Ambl. 310; *Ford* v. *Flemming*, 2 P. W. 469; *Savile* v. *Blackett*, *infra*.

(*p*) *Petiward* v. *Petiward*, cited 2 Bro. C. C. 111; *Savile* v. *Blackett*, 6 P. W. 779; Swin. 127; *Roberts* v. *Pocock*, 4 Ves. 150; *Chaworth* v. *Beech*, 4 Ves. 565; *Innes* v. *Johnston*, 4 Ves. 574; *Deane* v. *Test*, 9 Ves. 146.

(*q*) *Lambert* v. *Lambert*, 11 Ves. 607.

(*r*) *Parrot* v. *Worsford*, 1 Jac. & Walk. 601; *Raymond* v. *Broadbelt*, 5 Ves. 205.

(*s*) *Kirby* v. *Potter*, 4 Ves. 748; *Smith* v. *Fitzgerald*, 3 Ves. & B. 5.

per cent stock, and bought, in the Long Annuities, the sum of 1,250*l.* and made his will after such sale and investment, (the description of the testator's property being taken from a *former will*, at the date of which the stock specified did belong to the testator); it was held that a latent ambiguity arose on the will, from the testator's circumstances not being sufficient to meet the legacy he had given: And Lord Loughborough said (*t*); "If the testator *had* had the stock specified, at the time of his will, it would have been considered specific; and that he meant that identical stock; and that any act of his destroying that subject, would be a proof of an intent to revoke: but if the description is a denomination, not the identical *corpus*, in that case, if the thing itself cannot be found, and there is a mistake as to the subject out of which it is to arise, that should be rectified;" and it was decided, that the legatees should be paid out of the personal estate. Under this class likewise falls a bequest of money of a particular currency: as where a bequest was "of 5,000*l.* or 50,000 rupees current, and now vested in the East India Company's *bonds* (*u*);" this was held a general gift, with a fund appropriated for

(*t*) *Selwood* v. *Mildmay*, 3 Ves. 310.

(*u*) *Gillaume* v. *Adderley*, 15 Ves. 384; S. P. *Raymond* v. *Broadbelt*, 5 Ves. 205.

payment. A residuary bequest is likewise a bequest of quantity, and an enumeration of mortgages, bonds, &c. in such class does not vary the construction (*x*). A general bequest may be of every thing at *A*, which will be so far specific, as it points to goods at a particular place; and so far it exonerates this property from debts, as against the other personal estate undisposed of: it is however apprehended to be a *general* bequest of articles at a specified *place*, and must therefore be considered as falling under the first class (*y*). A bequest, though residuary, may be applied to a particular fund to arise from the sale of land, and be so far separated from the *general* estate, as to be specific (*z*).

Annuities, if to be paid out of the personalty, are comprehended under the first class (*a*); if, however, the same annuities be charged on land solely, they fall under the second class (*b*); and therefore, if the same are charged on the realty and personalty, they are general, as to

(*x*) *Attorney General* v. *Parkin*, Ambl. 566; 1 Ves. J. 282.

(*y*) See, however, *Nesbit* v. *Murray*, 5 Ves. 158.

(*z*) *Page* v. *Leapingwell*, 18 Ves. 463.

(*a*) *Hume* v. *Edward*, 3 Atk. 693; *Lewin* v. *Lewin*, 2 Ves. S. 417; *Habergham* v. *Vincent*, 2 Ves. 231; *Long* v. *Short*, 1 P. W. 403; *Peacock* v. *Monk*, 1 Ves. S. 133.

(*b*) *Sibley* v. *Perry*, 7 Ves. 534; *Long* v. *Short*, 1 P. W. 403.

the personal fund, and specific as to the real estate (*c*). A general bequest is not, however, altered in its nature, by reason of a direction to invest the same legacy in land (*d*), or therewith to purchase a ring, or other article (*e*), nor by being combined with a devise of land (*f*); and where a testator bequeathed a sum in the hands of *A*, *A*. having given a note for that sum to the testator, and having other money of the testator's in his hands, some of which was applied for the testator's use, and to his order before his death: this was held a pecuniary bequest, from the circumstances of the case; a difficulty arising which money should be held as applied by, or to the use of, the testator (*g*).

*Secondly*, a bequest is rendered *specific* by denoting the particular fund, debt, or thing given; of which the testator must be possessed at the time of making his will (*h*). Thus, a bequest of 100*l*. in the hands of *A*. (*i*), or a similar bequest of part of a debt owing from *B*. (*k*), or the bequest

(*c*) *Howe* v. *Lord Dartmouth*, 7 Ves. 147; *Mann* v. *Copland*, 2 Madd. 226.

(*d*) *Hinton* v. *Pinke*, 1 P. W. 541, overruling *Burridge* v. *Bradyl*, 1 P. W. 127.

(*e*) *Hannock* v. *Horton*, 7 Ves. 402; *Apriece* v. *Apriece*, 1 Ves. & B. 364.

(*f*) *Howe* v. *Lord Dartmouth*, 7 Ves. 147; 3 V. & B. 5.

(*g*) *Crockat* v. *Crockat*, 2 P. W. 165.

(*h*) *Bank of England* v. *Lunn*, 15 Ves. 582.

(*i*) *Hinton* v. *Pinke*, 1 P. W. 540; *Downes* v. *Townsend*, Ambl. 280; *Acton* v. *Acton*, 1 Meriv. 178.

(*k*) *Heath* v. *Perry*, 3 Atk.

of a sum in a particular chest (*l*), or of a sum due on the note of *C.* (*m*), or money in a particular place (*n*), or part of a sum due on a particular bond (*o*); or the bequest of a particular specified chattel, or part thereof (*p*), as a lease, or of money to arise from the sale of *lands*; or the bequest of a rent-charge out of a term (*q*); or a bequest of 300*l.* out of the 700*l.* now standing in my name in the four per cent consols (*r*); or a bequest to *A.* of 252*l.* which I have in the five per cents, to be laid out in an annuity for her life (*s*); or a bequest of 3,000*l.* stock in the three per cents, being part of *my* stock now standing in my name in the Bank of England (*t*); *is specific.* A bequest may be rendered specific, also, by a reference to a fund out of which prior bequests have been given.

103; *Thomand* v. *Lord Suffolk*, 1 P. W. 462; *Ashburner* v. *M'Guire*, 2 Bro. C. C. 108.

(*l*) *Lawson* v. *Stitch*, 1 Atk. 508; *Bronsdon* v. *Winter*, Ambl. 58.

(*m*) *Chaworth* v. *Beech*, 4 Ves. 555; *Gillaume* v. *Adderley*, 15 Ves. 389.

(*n*) *Sayer* v. *Sayer*, 2 Vern. 688.

(*o*) *Ashburner* v. *M'Guire*, 2 Bro. C. C. 108; *Chaworth* v. *Beech*, 4 Ves. 555; *Innes* v. *Johnson*, 4 Ves. 573.

(*p*) *Heath* v. *Perry*, 3 Atk. 103; *Long* v. *Short*, 1 P. W. 403; Swinb. 902; *Arnold* v. *Arnold*, Dick. 645.

(*q*) *Long* v. *Short*, 1 P. W. 403.

(*r*) *Morley* v. *Bird*, 3 Ves. 632; *Selwood* v. *Mildmay*, 3 Ves. 310; *Danvers* v. *Manning*, 2 Bro. C. C. 18.

(*s*) *Barnes* v. *Rowley*, 3 Ves. 306.

(*t*) *Barton* v. *Cooke*, 5 Ves. 463.

So a bequest in bar of *dower* (*u*), (though it has been said that the wife must be unprovided for (*x*);) or a bequest of stock, marking the *fund*, as at that time possessed by the testator, by the possessive pronoun "my," as a bequest of all my stock (*y*), or of a sum in my stock, or part of my stock, renders the same bequest specific (*z*). The doctrine of the latter cases has been disapproved (*a*); and in modern times, it should seem, so much stress is not laid on this monosyllable as formerly; and unless the stock is referred to, it is said the addition of the word "my" is not sufficient to render the bequest specific (*b*). Again, if a testator recites that he is possessed of a certain *sum* of stock, and then bequeaths the same sum, such recital and bequest referring to some identical *fund*, show clearly from whence the bequest is to arise, and render the bequest specific (*c*). A bequest may be ren-

(*u*) *Davenhill* v. *Fletcher*, Ambl. 244; *Blower* v. *Morret*, 2 Ves. S. 420; *Burridge* v. *Bradyl*, 1 P. W. 127.

(*x*) *Lewin* v. *Lewin*, 2 Ves. S. 418.

(*y*) *Drinkwater* v. *Falcon*, 2 Ves. J. 624; *Ashburner* v. *M'Guire*, 2 Bro. C. C. 107; *Ashton* v. *Ashton*, 3 P. W. 384; *Humphreys* v. *Humphreys*, 2 Cox Rep. 184; 1 Atk. 414, and cases; *Sibley* v. *Perry*, 7 Ves. 629; *Barton* v. *Cook*, 5 Ves. 464; *Bank of England* v. *Lunn*, 15 Ves. 582.

(*z*) *Kirby* v. *Potter*, 4 Ves. 750.

(*a*) *Avelyn* v. *Ward*, 1 Ves. S. 425.

(*b*) *Parrot* v. *Worsfold*, 1 Jac. & Walk. 602.

(*c*) *Pitt* v. *Camelford*, 3 Bro. C. C. 160; *Jefferys* v. *Jefferys*, 3 Atk. 120; *Attorney General* v. *Grote*, 3 Meriv. 320.

dered specific by the intention of the testator, apparent from the words of his will, as by a *reference* to the fund possessed by the testator at the time of making his will, as describing it as " my remaining stock (*d*);" or where a testator *directs* a sale of part of his *stock* for particular purposes, and gives general legacies in the *same* fund to certain legatees; because it would be absurd to contemplate the testator intended his trustee should sell his stock, and purchase a certain portion, in the same fund, to answer the general legacies given in that fund (*e*). Where *A.* a partner, bequeathed a sum that appeared due to him on the last settlement of accounts, on certain trusts, if the testator did not draw it out of trade before he died, the bequest was held, by Lord Hardwicke, to be specific, by reason of the latter words: the testator contemplating the identical sum to remain engaged in this fund till his death (*f*); though a bequest of a share in a partnership, generally, is construed such *share* as the testator shall be possessed of at his death, the will, as to personal estate, speaking for this purpose from the testator's death (*g*); and, therefore, falls under the

(*d*) *Sleech* v. *Thorington*, 2 Ves. S. 560.

(*e*) *Sleech* v. *Thorington*, 2 Ves. S. 564; *Ashton* v. *Ashton*, C. T. Talb. 152; *Avelyn* v. *Ward*, 1 Ves. S. 425.

(*f*) *Ackwell* v. *Child*, Ambl. 262.

(*g*) *Ellis* v. *Walker*, Ambl. 310.

former class. A *trust* to sell real estate for a *certain* sum, viz. 10,000 *l.* authorizes a sale only on these terms; and such sum being bequeathed in *certain* proportions, to several, amounting to 7,800 *l.* with the residue to *A.*; *A.* was held a specific legatee with the other legatees, and was considered to be entitled to 2,200 *l.* and on a deficiency, to abate in proportion only with the other legatees (*h*); because the fund was clearly ascertained, viz. the *land*, which, even before sale, is considered money in the Court of Chancery.

The same fund may be the subject of both species of bequests, viz. specific as to part of the fund, and general as to the residue: as where legacies were specific as to a certain quantity of stock, and general as to the residue of the personal estate, which residue included part of the same specified stock, the whole not having been applied specifically (*i*).

(*h*) *Page* v. *Leapingwell*, 18 Ves. 463.

(*i*) *Richardson* v. *Brown*, 4 Ves. 177; *Smith* v. *Fitzgerald*, 3 Ves. & B. 5.

## CHAP. III.

### *Of Vested and Contingent Legacies.*

BEQUESTS may next be considered, either as vested, or contingent: and here a distinction is made between legacies payable out of real, or personal estate, or out of both funds.

Legacies are, as before observed, primarily payable out of the personal estate, though real estate be charged (*k*); and, therefore, we will first consider legacies charged on, or payable out of, the personalty. These legacies are vested by the assent of the executor, immediately on the testator's death, if given generally (*l*); as "I bequeath 100*l.* to *A.* or, in case of *A.*'s death, to her children," the construction, in the latter bequest, being, the death of *A.* in the lifetime of the testator (*m*); but such construction may be altered from the intention (*n*). So a bequest

(*k*) *Sumwell* v. *Wade*, 1 Bro. 144; *Attorney General* v. *Downing*, Ambl. 571; *Tereyes* v. *Robertson*, Burr. 302; *Lord Inchiquin* v. *French*, Ambl. 33.

(*l*) *Chandos* v. *Talbot*, 2 P. W. 610.

(*m*) *Webster* v. *Hale*, 8 Ves. 410; *Cambridge* v. *Rous*, 8 Ves. 12; *Hinchcliffe* v. *Simmonds*, 4 Ves. 165; *Lowfield* v. *Stoneham*, 2 Stran. 1261; *Turner* v. *Moore*, 6 Ves. 559; *Slade* v. *Milner*, 4 Madd. 144.

(*n*) *Hervey* v. *M'Laughton*, 1 Price, 264; *Billings* v. *Sanders*, 1 Bro. 393.

is vested if given *in presenti*, payable at a future period, as a bequest to *A.* to be paid or payable at twenty-one (*o*); or where the time is left to the discretion of the executor (*p*). So where a bequest was made to *A.* to *be paid* to him at twenty-five, or between twenty-one and twenty-five, "if my executors think proper so to do;" and if *A.* should not receive *or dispose* of such legacy, then the bequest was given over; it was held, the legacy was vested absolutely in the legatee, by his surviving the testator (*q*). In the last case, the time of payment only is postponed, the gift being immediate. So where a testator directed his trustees to employ the *corpus* of a *sum* of money, and ordered the same to be paid to *A.* the legatee at twenty-five, the legatee, having survived the testator, died before that age; yet it was held the legacy was vested (*r*), the same being separated from the testator's other property. And where a bequest was to *A. when* he should attain twenty-five (*s*), with a direction

(*o*) *Hanson* v. *Graham*, 6 Ves. 245; *Reeves* v. *Brymer*, 4 Ves. 692; *Batsford* v. *Kebbel*, 3 Ves. 363; *Sibley* v. *Cook*, 3 Atk. 572; *Sibthorpe* v. *Moxon*, 3 Atk. 581; *Dawson* v. *Killet*, 1 Bro. C. C. 122; *Maddison* v. *Andrew*, 1 Ves. S. 60; *Kemp* v. *Davey*, 3 Bro. C. C. 472; *May* v. *Wood*, 1 Bro. C. C. 120; *Steadman* v. *Palling*, 3 Atk. 427.

(*p*) *Churchill* v. *Speake*, 1 Vern. 251.

(*q*) *Ross* v. *Ross*, 1 Jac. & Walk. 154.

(*r*) *Fonereau* v. *Fonereau*, 3 Atk. 644; S. C. 1 Ves. 119.

(*s*) *Melicot* v. *Bowes*, 1 Ves. S. 207; *Massey* v. *Hudson*, Meriv. 223; *Foncreau* v. *Fonereau*, 1 Ves. 119.

that *interest* should be paid for the legatee's education, with a power to the trustees to advance money to bind this legatee an apprentice, the remainder of the money to be paid when the legatee should attain twenty-five, and not before; it was held, that the legacy was vested, notwithstanding *A*, who survived the testator, died before twenty-five, from the testator's apparent intention; his object being to point out the time of payment, and not the period of vesting (*t*). And under this head may probably be cited the case of *Booth* v. *Booth*, 4 Ves. 404, where the bequest was of a *residue* to trustees *(being the corpus)* to invest and pay the interest equally between *A.* and *B.* till their respective marriages, and after their respective marriages to *transfer* their respective moieties unto them respectively; *A.* died without having been married, and it was held that she took a vested interest in a moiety. Now it is apprehended this legacy might have been supported as a vested bequest: 1st, Because the *corpus* was given to the trustees; 2d, Because interest was given till an event happened, which never arose; 3d, Because the period of marriage related to the transfer, and not to the vesting of the bequest (*u*).

(*t*) *Hanson* v. *Graham*, 6 Ves. 244; *Branston* v. *Wilkinson*, 7 Ves. 421; *Lane* v. *Goudge*, 9 Ves. 230.

(*u*) *Hanson* v. *Graham*, 6 Ves. 244; *Love* v. *L'Estrange*,

In *Scott* v. *Chamberlayne*, 3 Ves. 304, 491, the bequest was of the interest of a sum, to be applied in maintenance of *A*. till he should attain the age of twenty-one; and when and as soon as he should attain the age of twenty-one, then on trust to call in such sum of money and pay the same, together with the interest due thereon, to *A*.; but if *A*. should die before twenty-one, and without leaving issue, then over. By a codicil, the testator directed that the said legacy, principal and interest, should not be paid, and become the sole property of *A* until he attained twenty-five. *A*. attained twenty-one, and died before twenty-five; and it was held, that *A*. having attained twenty-one, the contingency did not arise, on which it was to go over; but it was doubted, whether the legacy was vested or no? From the foregoing cases it is apprehended the bequest was vested.

But if the objects to be entitled to a legacy are not ascertainable till a future period, then the time of vesting is postponed (*v*); and the circumstance of the legatees being *in esse* at the period of division or payment, is annexed

6 Ves. 248; though the case of *Booth* v. *Booth* was decided on a difference taken between a particular and a residuary bequest, see *Monkhouse* v. *Holme*, 1 Bro. C. C. 300.

(*v*) *Billingsley* v. *Wills*, Atk. 222; *Bennet* v. *Seymour* Ambl. 521; *Daniel* v. *Daniel* 6 Ves. 297; *Jenour* v. *Jenour* 10 Ves. 570.

to and forms part of the essence of the gift (*x*); and *Billingsley* v. *Wills* is sometimes cited as an authority to prove, that a bequest is not vested until the time of payment, unless the *corpus* be given; and the case of *Batsford* v. *Kebbel*, 3 Ves. 363, was decided on similar reasoning. So a bequest to several after the death of a tenant for life has been held *vested*, though two of such legatees, who survived the testator, died in the lifetime of the tenant for life (*y*); and where there was a bequest of a *residue* to *A.* for life, and after her death the house, furniture, &c. was directed to *be sold*, and the produce divided between the children of *B. C.* and *D.* equally; the shares of sons, with accumulations, to be paid at twenty-one, and the shares of daughters, with the accumulations, to be paid at that age or marriage: the children of *B.* survived the testator and died under twenty-one, yet it was held they

(*x*) *Gilmore* v. *Severn*, 1 Bro. C. C. 581; *Andrews* v. *Partington*, 3 Bro. C. C. 401; *Whitbread* v. *St. John*, 10 Ves. 152; *Sanbury* v. *Read*, 12 Ves. 75; *Smith* v. *Streatfield*, 1 Meriv. 360; *Walker* v. *Shore*, 15 Ves. 22.

(*y*) *Van* v. *Clerk*, 1 Atk. 511; *Scurfield* v. *Howe*, 3 Bro. C. C. 92; *Roebuck* v. *Dean*, 4 Bro. C. C. 404; S. C. 2 Ves. J. 267; *Molesworth* v. *Molesworth*, 4 Bro. C. C. 408; *Jackson* v. *Jackson*, 1 Ves. 217; *Benyon* v. *Maddison*, 2 Bro. C. C. 73; *Brown* v. *Bigg*, 7 Ves. 279; *Walker* v. *Main*, 1 Jac. & W. 1; *Blamire* v. *Geldart*, 16 Ves. 314; *Corbyn* v. *French*, 4 Ves. 435; *Sturgess* v. *Pearson*, 4 Madd. 411.

took *vested interests* (*z*). So a legacy may be vested, though an apparent condition never take effect; as where a bequest was made to *A.* for life, and from and after the decease of *A*, (in case he should become entitled), then on trust over, &c.; the construction being that in case *A.* should become entitled, then, viz. at his *decease*, to those in the ulterior limitations (*a*). A legacy may be vested though it be payable on a contingency (*b*); as a bequest to *A*, to be paid on the death of *B*, or a bequest to *A.* at twenty-one or marriage, whichever may first happen. So a bequest was held vested on the testator's death, notwithstanding the testator, who resided in India, and whose property was there, directed, that if either of his legatees, who resided in England, should die before the receipt of their legacy, the same should go to the children of such legatee (*c*). A legacy may be vested by *necessary implication*; as where a testator bequeathed the interest of a sum to *A.* and *B.* equally, and after the death of *B.* and his wife, then *B.*'s half to be equally divided amongst his children; and it was held, that the

(*z*) *Bolger* v. *Machell*, 5 Ves. 513.

(*a*) *Pearson* v. *Simpson*, 15 Ves. 32.

(*b*) *Meldicot* v. *Bowes*, 1 Ves. 208; *Hanson* v. *Graham*, 6 Ves. 239; *Goodtitle* v. *Whitby*, 1 Burr. 228; 1 Atk. 37.

(*c*) *Auction* v. *Manning*, 1 Ves. 367; *Jackson* v. *K*[illegible], 2 Ves. 285.

interest of one moiety vested in *B.* till the decease of himself and his wife, which interest would, in the event of his death in the lifetime of his wife, vest in his executors during his wife's life (*d*). So in *Wainwright* v. *Wainwright*, 3 Ves. 558, the residue of personalty was given to trustees, on trust to invest, &c. and pay 20*l.* of interest to *A*, for maintenance, until he should attain twenty-one, with liberty to advance 200*l.* to *A.* before he attained twenty-one; and in case *A.* should die before twenty-one, over, &c. *A.* attained twenty-one, and he was held absolutely entitled, because no ulterior benefit was intended if *A.* attained twenty-one. So where there was a residuary bequest to *A*, with a proviso that in case *A.* should die under twenty-one, or without leaving a husband, then over; *A.* having attained twenty-one, was held to take a vested interest, and to answer the intent "*or*" was construed "*and*" (*e*). Again, where a bequest was to *A.* of 1,000*l.* to be paid immediately after the testator's decease, in case *A.* should happen to be then married; but if *A.* should happen not to be married at the time of the testator's decease, then the testator directed the interest of her said legacy to be paid to her

(*d*) *Brown* v. *Clark*, 3 Ves. 168.

(*e*) *Weddell* v. *Mundy*, 6 Ves. 343.

during her natural life, to be paid to the day of her death, or till she should be married, which should first happen; and if she should die unmarried, then the testator directed the principal of the legacy of 1,000 *l.* to lapse, for the benefit of the person who might be entitled to the testator's real estate. The testator, by a codicil, also gave his niece the further sum of 200 *l.* in addition to what he had given her by his will. *A.* was unmarried at the testator's death, but married soon afterwards. It was held that *A.* was entitled, there being no gift over, and the intention being clear that in case of marriage she should be entitled (*f*); but in *Smith* v. *Fitzgerald*, 3 Ves. & Beames, 8, the Master of the Rolls said, "the court ought to see very clearly that there is not any thing in a will to which a recital can refer, in order that a recital may be turned into a bequest." A legacy may become vested on the happening of one of two events; as where a testator bequeathed a sum to his executors, the dividends to be applied for *A.* till her marriage or twenty-one, with a direction to transfer the principal at twenty-one, or marriage with consent; if she marry without consent, then to pay the divi-

(*f*) *Crowder* v. *Clowes*, 2 Ves. J. 449; vide also *Scott* v. *Bargeman*, 2 P. W. 68.

dends only to *A.* for life. *A.* attaining twenty-one, and being unmarried, will be absolutely entitled (*g*). So a legacy payable out of personalty is vested by a bequest of the interest in the mean time till payment (*h*), notwithstanding a declaration that the legacy should not be claimed till the legatees (*i*) attain a certain age; but a bequest of *maintenance*, if not equal to the interest, will not vest a legacy (*k*). A legacy is also vested by a bequest of the *corpus* to trustees (*l*), the testator thereby disclosing an intention to separate the same bequest, from the general personal fund. A bequest may also be vested by a promise by an intended executor in the testator's lifetime, (and which promise induced the testator not to alter his will, or to insert *A.*'s name and legacy), that after his,

(*g*) *Disbody* v. *Boyville*, 2 P. W. 548; *Jones* v. *Suffolk*, 1 Bro. C. C. 528; *Knapp* v. *Noyes*, Ambl. 664; *Osborn* v. *Brown*, 5 Ves. 527; *Loyd* v. *Branton*, 3 Meriv. 116.

(*h*) *Fonereau* v. *Fonereau*, 1 Ves. 119; *Heath* v. *Heath*, 2 Bro. C. C. 3; *May* v. *Wood*, 3 Bro. C. C. 472; *Monkhouse* v. *Holme*, 1 Bro. C. C. 300; *Walcott* v. *Hall*, 2 Bro. C. C. 304; *Cloberry's Case*, 2 Ventr. 342; *Hanson* v. *Graham*, 6 Ves. 249; *Lane* v. *Goudge*, 9 Ves. 230.

(*i*) *Hanson* v. *Graham*, 6 Ves. 250; *Dodson* v. *Kay*, 3 Bro. C. C. 409.

(*k*) *Pulsford* v. *Hunter*, 3 Bro. C. C. 416; *Hanson* v. *Graham*, 6 Ves. 249; *Leake* v. *Robinson*, 2 Meriv. 387.

(*l*) *Monkhouse* v. *Holme*, 1 Bro. C. C. 300; *Fonereau* v. *Fonereau*, 3 Atk. 644; *Batsford* v. *Kebbel*, 3 Ves. 363.

the testator's, death, he, the executor, would pay *A.* a legacy; though such legatee will be postponed in payment to other legatees in the will (*m*). In such a case the court acts on the conscience of the executor and residuary legatee, by reason of the *fraud* practised on the testator. A legacy may be vested likewise, by an express direction that the same shall not lapse by the death of the legatee in testator's lifetime, and a subsequent bequest to the legatee, his or her executors, administrators and assigns (*n*); but to prevent a lapse, it is necessary to name a substitute for the deceased legatee (*o*). Again, a legacy may vest by the happening of the express contingency on which it is to arise (*p*); as a bequest of interest of money to *A.* for life, and after the decease of *A*, to *B.* and *C*, equally between them, but if either of them should die before *A*, to the survivor; *B.* and *C.* both died in *A.*'s lifetime,

(*m*) *Reech* v. *Kennigate*, Ambl. 67; S. C. 1 Ves. S. 125; 1 Wils. 227, S. C.; *Drakeford* v. *Wilks*, 3 Atk. 539; *Reech* v. *Kennigate*, 1 Ves. S. 125.

(*n*) *Corbyn* v. *French*, 4 Ves. 418; *Sibley* v. *Cook*, 3 Atk. 572; *Sibthorpe* v. *Moxon*, 3 Atk. 581; *Bridge* v. *Abbott*, 3 Bro. C. C. 228; 1 Bro. C. C. 180; *Lane* v. *Goudge*, 9 Ves. 230; *Neville* v. *Neville*, 2 Vern. 431; *Barlow* v. *Grant*, 1 Vern. 255; *Barton* v. *Cook*, 5 Ves. 461.

(*o*) *Toplis* v. *Baker*, 1 P. W. 86.

(*p*) *Scurfield* v. *Howe*, [redacted] Bro. C. C. 92; *Brown* v. *Lord Kenyon*, 3 Madd. 410; *Sturges* v. *Pearson*, 4 Madd. 411 *Harrison* v. *Foreman*, 5 Ves. 209.

*B.* first, and it was held *C.* was entitled. So where the devise was to *A*, and if he died before twenty-one to *B.*; *A.* died before twenty-one, in the testator's lifetime, *B.* was held entitled. 2 Vern. 207.

A legacy will be construed vested, to give effect to the *intention*, though the contingency expressed does not happen (*q*); as where a testator bequeathed equal sums to each of his two grand-daughters for life, and to their children respectively; but if either of his grand-daughters should die without issue, her share to go to the children of the survivor. One of the grand-daughters died leaving children, and afterwards the other grand-daughter died without leaving issue, yet the children of the grand-daughter who died first were held entitled to the intirety.

And a bequest may be vested, though the purpose for which it was given never happens; as a bequest to *A.* to put him out an apprentice (*r*). *A.* died before he was put an apprentice, having made his will, and his representatives were held entitled. So where the bequest of interest was made to *A*, for the maintenance of her children, and she never had any child, yet it was held

(*q*) *Harman* v. *Dickinson*, 1 Bro. C. C. 90; *Harrison* v. *Foreman*, 5 Ves. 207; *Sturgess* v. *Pearson*, 4 Madd. 411.

(*r*) *Barton* v. *Cooke*, 5 Ves. 463.

she *was* entitled to the interest, especially as the bequest over, was to take effect only on her death (*s*). A bequest may likewise be vested by the arrival of the period for payment before a condition on which the bequest is to fail happens: as where a bequest was to *A*, to be paid twelve months after testator's decease; but if *A*. marry *B*, then the testator revoked the legacy given to her, and in lieu thereof gave her a shilling. *A*. did not marry *B*. till fourteen months after testator's death; and it was held her legacy was *vested*, and that the condition remained in force only during the suspension of the period directed for payment (*t*). Shares limited in default of appointment are interests vested, subject only to be devested by the exercise of the power (*u*). And a bequest may become absolutely vested by the contingency not happening, on which it is to go over; as where a bequest was to two, with a direction for its surviving, on the event of either of the legatees dying under twenty-one; but one attaining that age, and dying, it was held that the moiety vested in the other, since it could not survive according to

(*s*) *Hammond* v. *Neame*, 1 Swanst. 35.

(*t*) *Osborn* v. *Brown*, 5 Ves. 529.

(*u*) *Spencer* v. *Spencer*, 5 Ves. 368; *Fortescue* v. *Gregor*, 5 Ves. 554.

the intention of the testator (*x*). A legacy, though vested, is liable to be devested by means of an executory bequest, so as such bequest be to take place, if at all, within certain rules; which will be treated of more fully in its proper place (*y*). A legacy, if given to *A. at* twenty-one, or *when* (*z*) or *if* he attains twenty-one, or *if he shall survive B.* (*a*), is contingent, and does not vest unless *A.* attain that age, or survive *B.* Here the time of payment is annexed to, and forms part of the gift (*b*): the attaining twenty-one, or surviving *B*, is a condition precedent, the performance of which is necessary to vest the legacy (*c*). So a bequest, generally, to be paid or transferred (*d*) at twenty-one, or mar-

(*x*) *Reeves* v. *Brymer*, 4 Ves. 699; *Gibbons* v. *Caunt*, 4 Ves. 850; *Bolger* v. *Machell*, 5 Ves. 513.

(*y*) *Brown* v. *Lord Kenyon*, 3 Madd. 416; *Sturgess* v. *Pearson*, 4 Madd. 411; *Dean* v. *Test*, 9 Ves. 146; Ibid. 233; *Shephard* v. *Ingram*, Ambl. 458; *Harrison* v. *Foreman*, 5 Ves. 207; *Loyd* v. *Branton*, 3 Meriv. 117; *Robinson* v. *Leake*, 2 Meriv. 388.

(*z*) *Hanson* v. *Graham*, 6 Ves. 243; restricting *May* v. *Wood*, 3 Bro. C. C. 471; *Leake* v. *Robinson*, 2 Meriv. 384; *Hubert* v. *Parsons*, 2 Ves. 264; *Dawson* v. *Killet*, 1 Bro. C. C. 122; *Steadman* v. *Palling*, 3 Atk. 427; Ibid. 310; 2 Ves. 497; *Fonereau* v. *Fonereau*, 1 Ves. 119; *Cloberry's case*, 2 Ventr. 342.

(*a*) *Hodges* v. *Peacock*, 3 Ves. 735; *Glanvil* v. *Glanvil*, 2 Meriv. 38; P. Shep. T. 450.

(*b*) *Van* v. *Clarke*, 1 Atk. 212; *Scames* v. *Bingham*, 3 Atk. 57.

(*c*) *Goss* v. *Nelson*, 1 Burr. 227; *Mills* v. *Hatch*, 1 Eden, 342.

(*d*) *Leake* v. *Robinson*, 2 Meriv. 387.

riage, is contingent, there being no immediate gift to the object (*e*); and the time of payment, and of vesting, being the same. And a bequest may be contingent, by reason that the event on which it is to arise may never happen; as a bequest to *A.* on marriage (*f*); or a bequest to *A*, if *B.* shall die leaving *C*, and without having a wife or child, and *C.* die in *B.*'s lifetime (*g*); or a bequest to *A.* if he survives *B.* (*h*); or a bequest to *A.* in case she shall happen to be living with me at my decease (*i*): or a bequest to *A.* in case she be living at the death of *B.* (*k*).

Again, in *Batsford* v. *Kebbel*, 3 Ves. 364, the bequest was of the dividends of 500*l.* to *A.* until he should arrive at thirty-two; at which time the testatrix directed her executors to transfer to *A*, the sum of 500*l.* for his use. *A.* died before thirty-two. And a distinction was taken between the gift of the *corpus* and of the *dividends*; and it was said that in that case there was not any gift, but in the direction for payment,

(*e*) *Atkins* v. *Hiccocks*, 1 Atk. 500; *Seamer* v. *Bingham*, 2 Atk. 57.

(*f*) *Booth* v. *Booth*, 4 Ves. 404, being the case of a residue is said to be an exception to this rule, *sed quære*; *vide* p. 67, *ante*.

(*g*) *Holmes* v. *Cradock*, 3 Ves. 320.

(*h*) *Hodges* v. *Peacock*, 3 Ves. 735; *Machell* v. *Winter*, 3 Ves. 544.

(*i*) *Allen* v. *Cullon*, 3 Ves. 294.

(*k*) *Parsons* v. *Parsons*, 5 Ves. 581.

and that direction only attached on a person of the age of thirty-two. And *Billingsley* v. *Wills*, 3 Atk. 222, was decided on similar reasoning. And the *corpus* may be contingent, though interest given for maintenance be vested; as a bequest to *A.* when or if he attains twenty-one, with maintenance during his minority (*l*). If a legacy be uncertain in amount, the same is said to be contingent (*m*), *sed quære* the generality of this proposition; since even under a bequest of a residue to the children of *A*, after an estate limited to *A.* for life (*n*), the interest of each of the children vests on his or her birth, though the shares are liable to be varied by the birth of children during the life of *A.* The point to be adduced from the case of *Maddison* v. *Andrews* is merely that objects of a power do not take any interest till an appointment is made, unless there is a limitation in default of appointment (*o*). Legacies may be contingent, by reason of the uncertainty who may be the legatees; as a bequest to persons living at the death of *A.* and *B*, both of whom are living; or a bequest to

(*l*) *Roberts* v. *Pocock*, 4 Ves. 160.

(*m*) *Maddison* v. *Andrews*, 1 Ves. S. 60.

(*n*) *Crone* v. *Odell*, 1 Ball & B. 449; S. C. 3 Dow. Parl. C. 61; *Leake* v. *Robinson*, 2 Meriv. 382.

(*o*) *Butcher* v. *Butcher*, 1 Ves. & B. 95.

persons within five years, if then alive, o dead, leaving issue (*p*). And a legacy may *contingent*, because the objects can be *ascerta* only at a particular time, as the time of d sion (*q*), or answering a particular descrip at a future period; as where a bequest wa *A*, to be paid at twenty-one or marriage, interest in the mean time, but if *A*. died be twenty-one, then the bequest was to go ove *the younger* children of *B*. (*r*). The legacy held contingent, to vest in such as should younger children of *B*. at the time of *A*.'s d under twenty-one (*s*); but if the objects clearly ascertained (*t*), and the time of paym and division, only postponed, then the leg will be vested. A bequest may also be con gent by reason of a reference to a legacy g in the will of another person (*u*).

(*p*) *Shaw* v. *Cunliffe*, 4 Brown, 152; *Billingsley* v. *Wills*, 3 Atk. 222; *Sansbury* v. *Reid*, 12 Ves. 75; *Batsford* v. *Kebbel*, 3 Ves. 363; 3 Anstr. 629.

(*q*) *Ellison* v. *Airey*, 1 Ves. S. 115; *Brograve* v. *Winder*, 2 Ves. J. 638; vide *Danser* v. *Hawes*, Ambl. 276; *Luffer* v. *Edwards*, 3 Madd. 210; *Hughes* v. *Hughes*, 14 Ves. 237.

(*r*) *Billingsley* v. *Wills*, 3 222; *Bennet* v. *Seymour*, 1 521; *Daniel* v. *Daniel*, 6 297.

(*s*) *Crone* v. *Odell*, 1 E B. 449.

(*t*) *Hatch* v. *Hatch*, 1 1 342; *Reeves* v. *Brymer*, 4 692; *Taylor* v. *Longfo* Ves. 120; *Broome* v. *G bridge*, 4 Mad. 495.

(*u*) *East* v. *Cook*, 2 Ve

Legacies charged on land, especially if given by way of portion, (and legacies given by a parent to a child are generally considered as portions (*x*),) vest at the time appointed for payment (*y*); and lapse, for the benefit of the heir or devisee of the estate (*z*), by the death of the legatee before the expiration of such period (*a*); whether to be raised out of the rents and profits (*b*), or charged generally, or on a reversion (*c*), or by way of trust (*d*): and notwithstanding a direction to raise the same with all convenient speed, and even though interest be given in the mean time (*e*); because such a legacy is considered a personal benefit, and to

(*x*) *Pye* v. *Dubost*, 18 Ves. 152.

(*y*) Swinb. 592, 603; *Gordon* v. *Rames*, 3 P. W. 139; *Carter* v. *Bletsoe*, 2 Vern. 617; *Hall* v. *Terry*, 1 Atk. 502; *Paulett* v. *Paulett*, 1 Vern. 204, 321; *Smith* v. *Smith*, 2 Vern. 92; *Yates* v. *Pettiplace*, 2 Vern. 416; *Jennings* v. *Looks*, 2 P. W. 276; *Phipps* v. *Lord Mulgrave*, 3 Ves. 613; *Pearse* v. *Loman*, Ib. 135; *Harvey* v. *Ashton*, 1 Atk. 378; *Butler* v. *Duncombe*, 2 Vern. 760; S. C. 1 P. W. 458.

(*z*) *Codrington* v. *Foley*, 6 Ves. 383; *King* v. *Dennison*, 1 B. & B. 279.

(*a*) *Green* v. *Pigott*, 1 Bro. 105; note which cites *Gawler* v. *Standerwick*, 2 Cox, 15; *Prodger* v. *Abingdon*, 1 Atk. 481.

(*b*) *Harrison* v. *Nagle*, 3 Bro. C. C. 109.

(*c*) *Hall* v. *Terry*, 1 Atk. 502.

(*d*) *Bright* v. *Norton*, cited 1 Atk. 504; *Scott* v. *Beecher and wife*, 5 Madd. 99.

(*e*) *Pearse* v. *Loman*, 3 Ves. 138.

be acquired by the legatee only in the event of his living till the time of payment; and as against the representative of such a legatee, and the heir-at-law, or devisee of the real estate, the courts have always leaned in favour of the heir, or devisee (*f*). Where there is not any time appointed for payment of such a legacy, considerable contrariety exists, whether the bequest is or is not vested. *Cowper* v. *Scott*, 3 P. W. 120, is against the bequest vesting; though Lord Hardwicke, in *Tunstall* v. *Brachen*, Ambl. 167, (and see *Evelyn* v. *Evelyn*, 2 P. W. 666,) was decidedly in favour of the legatee taking a *vested* interest; unless it be the case of a portion, and the child die before he, or she, can want that provision (*g*). The latter, it should seem, is the better opinion, because every act is taken against the agent; and because all bequests payable out of land are specific, and specific bequests vest on the death of the testator (*h*).

The old doctrine also, was, that where a legacy was charged on lands, which yielded immediate profit, and no time was appointed for payment

(*f*) *Lord Hinchinbrooke* v. *Seymour*, 3 Bro. C. C. 394.

(*g*) *Trafford* v. *Ashton*, 1 P. W. 420; *Lord Hinchinbrooke* v. *Seymour*, 3 Bro C. C. 394; *Sherman* v. *Collins*, Atk. 320.

(*h*) *Davies* v. *Davies*, 1 Da[illegible] 84; *Kirby* v. *Potter*, 4 V[illegible] 751.

interest was allowed from the testator's death (*i*). Where the time of payment is postponed, for the benefit of the *heir* or the *estate*, the legacy is vested notwithstanding the legatee die before the time appointed for payment. Lord Hardwicke, in *Tunstall* v. *Brachen*, Ambl. 167, (where the devise was to *J. S.* paying thereout 100*l.* a year to *A*, testator's wife, for life, with several other legacies within twelve months after the decease of *A*,) held the postponement of payment to be for the benefit of the heir; and the representatives of some of the legatees deceased, were held entitled to the legacies given to the persons they represented, with interest from one year after the death of *A*. (*k*). In order to make a legacy charged on land vested, there must be words of gift (*l*); and a bequest, with a direction not to pay interest in the mean time till payment, have been held words of gift (*m*). A right of entry likewise, given on nonpayment of such a legacy, confers a vested interest (*n*).

(*i*) *Maxwell* v. *Wettenhall*, 2 P. W. 26; *Gibson* v. *Bott*, 7 Ves. 97; *Davies* v. *Davies*, 1 Dan. 84; *Conway* v. *Conway*, 3 Bro. C. C. 270.

(*k*) Vide also *Dawson* v. *Killet*, 1 Bro. C. C. 124; *Bayley* v. *Bishop*, 9 Ves. 6.

(*l*) *Manning* v. *Herbert*, Ambl. 576; *Norse* v. *Ormond*, 5 Mad. 113.

(*m*) *Sherman* v. *Collins*, 3 Atk. 320.

(*n*) *Eames* v. *Hancock*, 2 Atk. 507; *Sherman* v. *Collins*, 3 Atk. 320; *Manning* v. *Herbert*, Ambl. 575.

In *Lowther* v. *Condon* (*o*), there was an express direction, that the legacy of a daughter dying should not sink, but survive; and it was there said the chief distinction is, where the postponing is for the benefit of the person, or the estate: for instance, postponing the payment till twenty-one or marriage, seems to apply to the person; whereas postponing the payment till the death of a tenant for life (*p*), or on failure of issue, &c. seems to apply to the estate (*q*). In *King* v. *Withers*, 3 P. W. 415, 3,500*l.* was bequeathed to *B*, at twenty-one or marriage, if *A.* had not issue male; with a subsequent direction, that that sum should be paid to *B.* *whenever* *A.* should die without issue male: *B.* married and died, and then *A.* died without issue male, and it was held the representatives of *B.* were entitled. And again, where a devise was to trustees, in trust within a given time to raise (*r*), out of the rents and profits of land, 1,500*l.* for *A.*; *A.* survived the testator, but died before the legacy was raised, and before the expiration of the appointed time, yet it was held the legacy was vested, the benefit being intended to the

(*o*) 2 Atk. 127.

(*p*) *Scott* v. *Beecher and wife*, 5 Madd. 99.

(*q*) *Wilson* v. *Spencer*, 3 P. W. 174.

(*r*) *Cowper* v. *Scott*, 3 P. W. 120; *Wilson* v. *Spencer*, Ib. 172.

estate (*s*). And where the fee was limited, after the death or marriage of *A.* to *B*, provided he paid *C.* 400*l.* though *C*, who survived the testator, died in the lifetime of *A*, it was held that *C.*'s representatives were entitled (*t*). Where lands were devised on *condition* (*u*) to pay legacies, and a power of distress and entry was given on nonpayment, the legacies were held vested, even as against a purchaser who had notice before he paid his money; and though such power was omitted, yet the heir might enter for breach of the condition, and would be decreed a trustee in equity for the legatees (*v*). Sometimes the devise and the legacy are said to vest at the same time (*x*); which is, in other words, admitting that the legacy is vested, though postponed in payment for the benefit of the *estate*, or the particular *tenants*. And in *Wilson* v. *Spencer*, 3 P. W. 172, the court, on a devise to *A.* for life, remainder to *B.* in fee, charged with a legacy, ordered the tenant for life to keep down the interest, and that the

(*s*) *Wilson* v. *Spencer*, 3 P. W. 170.

(*t*) *Maybanks* v. *Brooks*, 1 Bro. C. C. 84.

(*u*) *Wigg* v. *Wigg*, 1 Atk. 382.

(*v*) Ibid.

(*x*) *Goodwyn* v. *Monday*, 1 Bro. C. C. 190; *Dawson* v. *Killet*, Ib. 123; *Jeal* v. *Tickner*, Ambl. 703; *Clarke* v. *Ross*, 2 Dick. 529; *Hodson* v. *Rawson*, 1 Ves. 48; *Scott* v. *Beecher and wife*, 5 Madd. 99.

principal should be raised by a sale of so much of the land as would be sufficient to pay the same legacy, with interest and costs.

If legacies are given to be paid on land, of which the testator is seised in *reversion*, and which fact does not appear by the will, the legacies will be directed to be raised by a sale or mortgage of the reversion, and interest at the rate of four per cent will be allowed from the testator's death till payment (*y*).

A charge made by will, in pursuance of a general power in a settlement to charge portions by deed or will, has been held (*z*) to affect the life estate of the widow of the testator, under his marriage settlement; and that such a power was like a power of leasing, which over-reaches all estates. Again, where a testator devised his lands to his wife *A.* for life, with remainder to his son *B.* in fee, on condition that *B.* should, within one year after the death of *E. H*, pay 1,000*l.* to the testator's daughter *F*, with a proviso of nonpayment that the daughter might enter. *E. H.* died in the lifetime of *A*, and on a bill filed by *F.* against *B*, it was decreed that the portion should be raised by *sale*, unless

(*y*) *Davies* v. *Davies*, 1 Dan. 84.

(*z*) *Beale* v. *Beale*, 1 P. 245.

*B.* should pray it might be raised by mortgage (*a*).

It may not be irrelevant here to observe, that, under the trusts in settlements, reversionary terms are often directed to be sold or mortgaged to raise portions (*b*). In *Clinton* v. *Smith*, 4 Ves. 460, it is said "the court will lay hold of any words, from which it can be fairly inferred, that it is not the *intention* to charge a reversionary term with *portions* during the lives of tenants for life, from the infinite inconvenience and great burden it would bring on the reversioner." But in *Codrington* v. *Foley*, 6 Ves. 386, it is said, whether "*portions* are to be raised out of reversionary *terms*, or not, depends on the particular penning of the trust, and the meaning and intent of the instrument; the intention of the parties to the instrument is the only rule by which to be guided. The general rule is, if the portions are vested, and the contingencies have happened on which the portions are to be paid, the interest is payable, and the portions must be raised by a sale of the reversionary term; but they cannot be raised in the

(*a*) *Bacon* v. *Clarke*, 1 P. W. 480.

(*b*) *Sandys* v. *Sandys*, 1 P. W. 710; *Gerrard* v. *Gerrard*, 2 Vern. 458; *Staniforth* v. *Staniforth*, 2 Vern. 460.

lifetime of the parent, where the parent has a power to appoint the fund, without that parent's direction (*c*)."

In *Pierrepont* v. *Lord Cheney*, 1 P. W. 493, where in a settlement a reversion was limited to *A.* for life, &c. *B.* for life, &c. *C.* for 500 years, on trust after the death of *B*, to raise 20,000*l.* for a daughter; with maintenance, payable quarterly, of 300*l.* a year till such daughter should attain the age of twenty-one years, afterwards 400*l.* a year till the portion was paid, to be raised by profits, sale or mortgage. *B.* died leaving *A*, and there was a daughter. The court inclined against a mortgage for raising the maintenance money, chiefly because the maintenance and portion were to arise from the same fund; and the court took on itself the care of securing the child's portion. However, where a particular mode is pointed out, by which to raise portions, no other mode will be resorted to. *Joy* v. *Gilbert*, 2 P. W. 13; *Newland* v. *Shepard*, 2 P. W. 196; *Evelyn* v. *Evelyn*, 2 P. W. 661; *Mills* v. *Banks*, 3 P. W. 1; in which last case, profits were construed to mean yearly profits: though in *Trafford* v. *Trafford*, 1 P. W. 418; *Ravenhill* v. *Dansey*, 2 P. W. 180; *Reresby* v. *Newland*, 2 P. W. 101, affirmed

(*c*) *Codrington* v. *Foley*, 6 Ves. 380.

2 Bro. Parl. C. 487; profits were held to mean such profits as might arise by mortgage or sale. However, a portion will not be raised against the intention, before the period appointed for raising it; as where portions were directed to be raised by sale of a term; and it was also directed, that maintenance money should commence only from the time the estate limited to the trustees should come into *possession* (*d*). Nor was a portion allowed to be raised out of a reversionary term, where the trust was to raise by sale or mortgage, since there was a direction that the term should not prejudice the jointure of the wife (*e*); though the judgment was given on the idea there was not any power of sale or mortgage. *Sed vide* 2 P. W. 662. So where a term is created for raising portions, and is subsequent to an estate tail, the court will rectify the same, if so placed by mistake, or contrary to the terms and provisions of the settlement; especially if made in pursuance of articles, and notwithstanding a recovery has been suffered of part of the land (*f*); but this latter doctrine does not hold as against a remainder-man (*g*). However, portions cannot be

(*d*) *Butler* v. *Duncombe*, 1 P. W. 453; *Brome* v. *Berkeley*, 2 P. W. 487.

(*e*) *Evelyn* v. *Evelyn*, 2 P. S. 309; S. P. 1 Atk. 191.

(*f*) *Uvedale* v. *Halfpenny*, 2 P. W. 151.

(*g*) *Hilton* v. *Briscoe*, 2 Ves.

raised unless the events, on which they are
rected to be raised, happen; though it may
apparent, that the intent was more full than t
trust of a term expresses (*h*).

Where a testator devised lands to trustees,
trust to pay the rents thereof till sale to t
testator's four daughters, and the survivors a
survivor of them, equally; and on further tru
when it should be for the benefit of the childr
to *sell* the land, and apply the money for t
children equally; the shares of sons to be pa
able at twenty-one, and the shares of daughte
to be payable at that age, or marriage; and
any of the children should die before their shar
should become payable, then over: the la
must be considered as money and as legaci
vested, subject to be devested by the death
sons under twenty-one, and by the death
daughters under that age, and unmarried (*i*).

A legacy charged on a mixed fund, partak
of the nature of both of the foregoing legacie
for if the legatee die before the time of paymen
the legacy is vested and payable, as regards th
personal estate, so far as this fund will extenc
but as to the realty, the legacy will fail by th

(*h*) *Worsley* v. *Earl of Glanville*, 2 Ves. S. 333; *Wingrave* v. *Pulgrave*, 1 P.W. 401; *Mosley* v. *Mosley*, 5 Ves. 258.

(*i*) *Doughty* v. *Ball*, 2 W. 320.

death of the legatee before the time of payment (*k*), with the exception before stated.

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Legacies may be again subdivided into,

1st, Those which are absolute:

2d, Those on condition, either precedent or subsequent, or to be defeated by a conditional limitation:

3d, Those which are additional or accumulative:

4th, Those which are held on trust for the benefit of others:

5th, Those which confer partial interests:

6th, Those which are subject to be defeated by executory bequests; and,

Lastly, Of *donatio mortis causâ*.

(*k*) *Duke of Chandos* v. *Talbot*, 2 P. W. 610; *Jennings* v. *Looks*, 2 P. W. 277; *Sherman* v. *Collins*, 3 Atk. 320; *Richardson* v. *Greeve*, 3 Atk. 69; overruling *Van* v. *Clark*, 1 Atk. 512; which considered the same rule to be applied to a mixed fund, as was established in legacies charged on real estate.

## CHAP. IV.

### *Of Absolute Legacies.*

A BEQUEST to a man generally, or of the interest to him for life, with a power of distributing the principal (*l*), even after his death, viz. by will (*m*), or for his own use and disposal (*n*), confers on him an absolute interest (*o*). And where a bequest was to *A*, to be paid at twenty-five, or between twenty-one and twenty-five, with interest in the mean time; and if *A*. should not receive the legacy, or dispose of it by *will* or otherwise, it was given over: *A*. was held absolutely entitled, and the bequest over was considered void (*p*). But if a bequest be to *A*. for life, and after his death to such person as he shall appoint by his will, here *A*. must appoint by will to entitle any person to claim this bequest over (*q*). So where a bequest was made

(*l*) *Elton* v. *Sheppard*, 1 Bro. C. C. 532.

(*m*) *Hales* v. *Margerum*, 3 Ves. 300.

(*n*) *Rawlins* v. *Jennings*, 13 Ves. 39.

(*o*) *Bull* v. *Kingston*, 1 Meriv. 314; *Hixon* v. *Oliver*, 13 Ves. 108; *Wadley* v. *North*, 3 Ves. J. 364.

(*p*) *Ross* v. *Ross*, 1 Jac. & W. 154.

(*q*) *Maddison* v. *Andrew*, 1 Ves. S. 60; *Bradley* v. *Westcote*, 13 Ves. 453; *Butcher* v. *Butcher*, 1 Ves. & B. 95.

to *A.* to dispose of by will (*r*), *A.* was held to be absolutely entitled. Again, where a testator made his dear wife *B.* sole heir and executrix of his real and personal estate, to sell and dispose at her pleasure, and to pay the testator's debts and legacies, *B.* was held absolutely entitled to the surplus after payment of debts (*s*). Thus, a bequest of interest to one for life, then to *A*, gives *A.* an absolute interest, subject to the life estate (*t*). So a residuary bequest to executors, in trust for *A.* till he attain twenty-one, with a direction that then the trust should cease, was held to confer on *A.* an absolute interest (*u*): the court construed the bequest as if it had been to trustees in trust for *A.* till he attain twenty-one, and then to *A.* absolutely. Again, where a bequest was to *A.* and *B.* during their lives, and then to the lawful *issue* of *B*, if she should have any, if not, then in trust for *C.* till he shall come of age: *B.* died without issue, but after the death of *C*, who attained twenty-one; and it was held *C.*'s representatives were entitled with interest, since the death of *A.* and *B*, for the purpose of effectuating the testator's inten-

(*r*) *Maskelyne* v. *Maskelyne*, Ambl. 751.

(*s*) *Rogers* v. *Rogers*, 3 P. W. 192.

(*t*) *Clough* v. *Wynne*, 2 Madd. 190.

(*u*) *Peat* v. *Powell*, 1 Eden, 470.

tion, and on the contingency which happened (*x*); the construction being, it is apprehended, if *B.* shall die without having had issue, then the bequest is to remain over to *C*, nevertheless to be in trust for him till he attain twenty-one.

A bequest may also be absolute by reason of the *repugnancy* of a *condition* (*y*). A bequest to *A*, for such purposes as he shall think fit, is a bequest to him absolutely, notwithstanding *A.* be described in a preceding part of the will as an executor in trust (*z*). Again, a bequest (in case *A.* should not choose to occupy his house, which the testator had given her by his will, during the minority of his son), to purchase furniture, or for *any other purpose* she should think proper; though the widow did occupy the house, yet it was held she was absolutely entitled to the legacy (*a*). So an indefinite bequest of dividends, whether immediately, or by way of remainder, passes the absolute property in stock (*b*). So a bequest to *A*, with a direction to pay the produce to *B*, gives *B.*

(*x*) *Atkinson* v. *Paice*, 1 Bro. C. C. 91; *Hale* v. *Beck*, 2 Eden, 229.

(*y*) *Bradly* v. *Prixito*, 3 Ves. 324; cited 3 Meriv. 183; Co. Litt. 206.

(*z*) *Gibbs* v. *Rumsey*, 2 Ves. & B. 294; *Price* v. *Archbishop of Canterbury*, 14 Ves. 370.

(*a*) *Isherwood* v. *Paynes*, 5 Ves. 677.

(*b*) *Elton* v. *Sheppard*, 1 Bro. C. C. 532; *Phillips* v. *Chamberlayne*, 4 Ves. 58.

an absolute interest (*c*). Again, a bequest of a sum, with a direction that the *income* (*d*) thereof shall be for the sole use and benefit of *A*, entitles *A*. absolutely. So where a bequest was to *A*. for her and her children's *use*, a transfer was directed to *A*. (*e*). And where a bequest was to *A*, trusting that she would, in fear of God and in love to the children committed to her care, make use of it as should be for *her own* and their spiritual and temporal good: remembering always, according to circumstances, the Church of God and the poor; *A*. was held absolutely entitled, as she had the power of diminishing the capital (*f*). So a bequest, for the purpose of purchasing an annuity for *A*, gives *A*. an absolute interest, since the whole legacy is to be applied for *A*.'s benefit (*g*); though, by construction, the same may be confined to a life interest (*h*). A specific bequest of things, which are consumed in their *use*, vests in the legatee absolutely, though given for life (*i*): if they pass

(*c*) *Page* v. *Leapingwell*, 18 Ves. 466; *Randall* v. *Russell*, 3 Meriv. 194; *Clough* v. *Wynne*, 2 Madd. 188.

(*d*) *Adamson* v. *Armitage*, Cooper, 283.

(*e*) *Robinson* v. *Tickell*, 8 Ves. 142.

(*f*) *Curtis* v. *Rippon*, 5 Madd. 434.

(*g*) *Bayley* v. *Bishop*, 9 Ves. 6.

(*h*) *Innes* v. *Mitchell*, 6 Ves. 464.

(*i*) *Randall* v. *Russell*, 3 Meriv. 194.

as a residue, then they must be sold, and the produce invested, and the interest paid to the tenant for life. And the same legatee may take both an absolute and partial interest, in different things, by the same will (*k*): and an absolute interest may likewise be given, though part of the object of the testator in making such gift fail (*l*); and though money be directed to be laid out in land, and settled in fee, yet the legatee, on surviving the testator, will be absolutely entitled to the money (*m*). Again, where there was a gift to *A*, and what he shall *leave* was given over: *A.* was held to take absolutely, for the uncertainty that otherwise would arise; in addition to which, he had an implied power of disposition over the whole fund (*n*). So a bequest to *A*, and in case of *A.*'s death then to *B*, *A.* surviving the testator has been held absolutely entitled; the construction being in case of *A.*'s death in the lifetime of the testator (*o*). And notwithstanding a conditional

(*k*) *Richards* v. *Baker*, 2 Atk. 323; *Shanley* v. *Baker*, 4 Ves. 732.

(*l*) *Hammond* v. *Neame*, 1 Swanst. 35.

(*m*) *Cope* v. *Wilmot*, Ambl. 704.

(*n*) *Malin* v. *Keightley*, 2 Ves. J. 333; *Bradley* v. *Westcote*, 13 Ves. 457; *Curtis* v. *Rippon*, 5 Madd. 434.

(*o*) *Hinckles* v. *Simmons*, 4 Ves. 160; *Ommany* v. *Bevan*, 18 Ves. 291; *Slade* v. *Milner*, 4 Madd. 144.

limitation may be annexed to a legacy, if the time appointed for payment arrives before the breach of the condition (*p*), or if the condition be complied with (*q*), or if a contingency on which it is to go over never arises (*r*), the legacy becomes absolute. A legacy may also become absolute, by the impossibility of performing a condition subsequent, or by the act of God, or by the act of the party to whom the condition was to be performed (*s*). Thus, a legacy given till an act is done, which becomes impossible by the act of God, renders the legacy absolute (*t*). So where a bequest was to *A.* in case she should have legitimate children, on failure of which to go over; *A.* had one child, who died before her, yet she was held to be absolutely entitled to this legacy on surviving the testator (*u*). And where a bequest is given, with a discretion, to persons who refuse to act, to abridge the

(*p*) *Osborne* v. *Browne*, 5 Ves. 527; *Bridges* v. *Hutton*, 1 Ves. & B. 137.

(*q*) *Osborne* v. *Browne*, 5 Ves. 527; *Forbes* v. *Ball*, 3 Meriv. 437.

(*r*) *Crowder* v. *Clowes*, 2 Ves. J. 450; *Wainwright* v. *Wainwright*, 3 Ves. J. 559.

(*s*) *Aislabie* v. *Rice*, 3 Madd. 257; *Darley* v. *Longworth*, 3 Bro. Parl. C. 359.

(*t*) *Lowther* v. *Cavendish*, Ambl. 356; S. C. 3 Bro. Parl. C. 349; 1 Eden, 99, S. C.

(*u*) *Wall* v. *Tomlinson*, 16 Ves. 413.

legatee's interest, the legatee will be absolutely entitled (*x*); though where the interest of a sum has been given for life only, with a power of advancement, the court has, under circumstances, directed an inquiry as to the necessity, and propriety, of such advancement (*y*).

It is a rule of law, suggested by the policy of a commercial country, that property shall not be rendered unalienable beyond a life or lives in being, and twenty-one years and a few months (*z*): wherever, therefore, a limitation of a chattel or personal thing is such, as if applied to land of freehold tenure would create an estate-tail, the whole interest will vest absolutely in the first taker, and the ulterior limitation must be considered too remote, and as such void (*a*). This rule is established in analogy to the rule of law relating to real estate, which cannot be tied up longer, and because of personalty, there cannot be a recovery (*b*). Therefore a bequest of per-

(*x*) *Keates* v. *Burton*, 14 Ves. 434.

(*y*) *Robinson* v. *Creator*, 15 Ves. 526.

(*z*) See chap. *Legacies subject to Executory Bequests.*

(*a*) *Sheffield* v. *Lord Orrery*, 3 Atk. 287; *Fordyce* v. *Ford*, 2 Ves. J. 538; *Webb* v. *Webb*, 1 P. W. 132; *Seale* v. *Seale*, 1 P. W. 290; *Butterfield* v. *Butterfield*, 1 Ves, S. 134.

(*b*) *Crawford* v. *Trotter*, 4 Madd. Rep. 361.

sonalty to one for life, and to the heirs of his body (*c*), or his heir male (*d*), or his heirs male, or to his issue (*e*), gives the legatee the absolute interest (*f*). And where a bequest was to *A*, or in case of his death, then to his issue, or children; *A*, on surviving the testator, will be absolutely entitled: and the issue will take only in case *A*. die in the lifetime of the testator (*g*). The old distinction between a limitation to a man and his heirs, &c. of a term in gross, and of one created *de novo* out of the inheritance, the latter of which was held to cease on failure of issue (*h*), is abrogated by the decision in the *Duke of Norfolk's case*, 3 Ch. Cas. 30; and in *Burgis* v. *Burgis*, 1 Mod. 115. The like observation applies to the distinction between a limitation giving an express and an implied estate-tail (*i*); and the difference of con-

(*c*) *Britton* v. *Twining*, 3 Meriv. 176; *Elton* v. *Eason*, 19 Ves. 78.

(*d*) *Ivie* v. *Ivie*, 1 Atk. 430; *Seale* v. *Seale*, 1 P. W. 290.

(*e*) *Chandler* v. *Price*, 3 Ves. 101; *Lyon* v. *Michell*, 1 Madd. 473; *Glover* v. *Strethoff*, 2 Bro. C. C. 33.

(*f*) *Garth* v. *Baldwin*, 2 Ves. 661; *Duke of Bridgewater* v. *Geston*, 2 Ves. 123.

(*g*) *Turner* v. *Moor*, 6 Ves. 557; *Webster* v. *Hall*, 8 Ves. 410; *Crooke* v. *De Vandes*, 9 Ves. 203; *Elton* v. *Eason*, 19 Ves. 79; *Doon* v. *Penny*, 1 Meriv. 20; *Massey* v. *Hudson*, 2 Meriv. 132.

(*h*) *Leonard Lovies' case*, 10 Co. Rep. 87.

(*i*) Fearne's Cont. Rem. 486; *Britton* v. *Twining*, 3 Meriv. 176.

struction between the bequest of interest for life, and if the tenant for life should die without issue, then the principal to be paid over, and a bequest of the principal originally, is also abrogated by *Butterfield* v. *Butterfield*, 1 Ves. S. 133, 154 (*k*). And notwithstanding bequests, similar to those last-mentioned, may be limited as heir-looms, and be directed to be kept with the family estate, or lands devised, so long as the rules of the law of the realm will permit (*l*), or so long as the rules of law and equity will allow (*m*), yet the same bequests shall vest absolutely in the first taker, having such an estate as would pass the inheritance if the devise had been of freehold estate, and will become part of the personal estate of the legatee, though an infant (*n*). Even a power or limitation to destroy such absolute vesting is void, unless duly confined within the prescribed limits against perpetuities (*o*). An annuity, though personal, is not entailable; but the same may be limited so as

(*k*) *Smith* v. *Clever*, 2 Ch. C. 410.

(*l*) *Trafford* v. *Trafford*, 3 Atk. 343; *Ware* v. *Polhill*, 11 Ves. 257.

(*m*) *Vaughan* v. *Burslem*, 3 Bro. C. C. 102; *Carr* v. *Erroll*, 14 Ves. 479; sed vide *Deerhurst* v. *St. Albans*, 5 Mad. 232.

(*n*) *Foley* v. *Burnel*, 1 Bro. C. C. 279; *Vaughan* v. *Burslem*, *supra*; *Sheffield* v. *Lord Orrery*, 3 Atk. 287.

(*o*) *Ware* v. *Polhill*, 11 Ves. 257.

to pass a conditional fee: and the legatee on having issue will acquire the absolute fee of this annuity (*p*). This is now the only instance of a conditional fee at common law. It is doubted whether an annuity may be circumscribed by an executory bequest (*q*). As a limitation over, after a general failure of heirs of the body, or issue, is too remote and therefore void, because the whole is already vested in the first taker (*r*), the courts endeavour to confine the words, "dying without issue, heirs, or children," to the time of the death of the legatee, so as to give effect to the bequest over; and no distinction is made between the bequest of the principal, or of the interest only (*s*). Thus, where a bequest was to

(*p*) *E. Stafford* v. *Buckley*, 2 Ves. 180.

(*q*) *Turner* v. *Turner*, Ambl. 776; S. C. 1 Bro. C. C. 325; 1 Inst. 20.

(*r*) *Terezes* v. *Robertson*, Barn. 301; *Attorney General* v. *Bird*, 1 Bro. C. C. 170; 2 Ibid. 33; *Atkinson* v. *Hutchinson*, 3 P. W. 259; 3 Ves. 313; *Everest* v. *Gill*, 1 Ves. J. 286; *Stafford* v. *Buckley*, 2 Ves. 181; *Trafford* v. *Boehm*, 3 Atk. 448; *Ridge* v. *Hudson*, Burr. 12; *Boders* v. *Watson*, Ambl. 399; *Handen* v. *Clarke*, 1 Ves. 110; *Robinson* v. *Fitzgerald*, 2 Bro. C. C. 127.

(*s*) *Genorchy* v. *Bosville*, C. T. Talb. 3; *Sheppard* v. *Lepingham*, Ambl. 123; *Butterfield* v. *Butterfield*, 1 Ves. S. 154; *Chamberlain* v. *Jacob*, Ambl. 72; *Vaughan* v. *Farrer*, 2 Ves. 127; *Nichols* v. *Hooper*, 1 P. W. 199; *Target* v. *Gaunt*, 1 P. W. 433; *Pinbury* v. *Elkin*, 1 P. W. 564; *Chapman* v. *Forth*, Ibid. 666; *Hughes* v. *Sayer*, Ibid. 534; *Atkinson* v. *Hutchinson*, 3 P. W. 259; note to Ibid. 262.

*A.* for life, and afterwards for *A.*'s children for maintenance, and for want of such issue over; it was held that *issue* meant children, and therefore the bequest over was supported (*t*). So where a bequest was given over to *C*, if *A.* should die under twenty-one, and *B.* should die without any other child or children, the ulterior limitation was supported (*u*). The word "heirs" also may, from the intention, be words of purchase; as where, after life estates to the husband and wife, the limitation over was to the heirs of their bodies, and their executors, administrators and assigns (*x*). And the word "children" may be a word of limitation from the clear intent (*y*); and "issue" may, by construction, be a word of purchase, and to take the share intended for the parent by substitution (*z*): *e. g.* where the bequest was to *A.* and *B*, *or* their children, it was held the children were entitled only in the event of the death of their parents in the lifetime of the testator (*a*); and therefore the parents

(*t*) *Maddon* v. *Staines*, 2 P. W. 422; *Sibley* v. *Perry*, 7 Ves. 527; *Lumpley* v. *Blower*, 3 Atk. 397.

(*u*) *Studholme* v. *Hodgson*, 3 P. W. 312; overruling *Love* v. *Windham*, 1 Mod. 50.

(*x*) *Hodsel* v. *Bussey*, 2 Atk. 642; cited 2 Ves. S. 660.

(*y*) *Crone* v. *Odell*, 1 B. & B. 449.

(*z*) *Lumpley* v. *Blower*, 3 Atk. 396; *Le Tarrant* v. *Spencer*, 1 Ves. S. 98; *ante*, p. 99, n. (*g*).

(*a*) *Crooke* v. *De Vandes*, 9 Ves. 197; *ante*, p. 99, n. (*g*).

surviving the testator were held to be absolutely entitled. It may be remarked that bequests, though absolute, may be merely equitable, during the lives of certain persons, as executors; and legal after the death of such persons (*aa*).

## CHAP. V.

### *Of Bequests on Condition.*

BEQUESTS may be given on condition, and conditions are either precedent or subsequent. It may be observed, that to every bequest may be added whatever condition the testator pleases (*a*), provided the same be possible, legal, not infringing either the moral or the civil law, and not repugnant to the bequest (*b*); for all other conditions are void (*c*). It may be remarked, that where a person appoints by will under a power, a sum to a child, on condition; the condition, unless authorized by the power, is void (*d*). Where

(*a a*) *Gardiner* v. *But*, 3 Madd. 425.

(*a*) *Reynish* v. *Martin*, 3 Atk. 332; *Harvey* v. *Ashton*, 1 Atk. 380, and n. 1; 1 Inst. 205, n. 98.

(*b*) *Bradly* v. *Picxito*, 3 Ves. 324; cited in *Britton* v. *Twining*, 3 Meriv. 183.

(*c*) Preston's Shep. T. 434; Ibid. 451; 2 Tho. Co. Litt. 21, 22, & notes; Swinb. 384, 408.

(*d*) *Burleigh* v. *Pearson*, 1 Ves. 282.

a bequest is given to vest on a condition precedent, the condition must be performed before the legatee will be entitled to any benefit arising from the testator's bounty (*e*): and here a distinction is taken in regard to bequests on marriage; and it is said the condition on which the legacy is to vest is marriage, and if to such marriage consent is required, such consent, unless the legacy be given over, is considered *in terrorem* only, and in fact amounts to a nullity (*f*).

Of the first description, is a bequest to *B.* on marriage before twenty-one, with the consent of *A*, with a bequest over, in the event of *B.'s* marriage before twenty-one without such requisite consent (*g*); and therefore if *B.* marry before twenty-one without such consent, and afterwards attain twenty-one while so married, the bequest to *B.* can never take effect, because the condition cannot be performed (*h*); and *quære*, whether even a second marriage, with the requisite consent, before twenty-one, would be a

(*e*) *Fry* v. *Porter*, 1 Mod. 300; 1 Inst. 237, a, n. 1.

(*f*) *Jervois* v. *Duke*, 1 Vern. 20; *Atkins* v. *Hiccocks*, 1 Atk. 502; *Scott* v. *Tyler*, 2 Bro. C. C. 488; denying *Hemmings* v. *Munckley*, 1 Bro. C. C. 304; *Clarke* v. *Parker*, 19 Ves. 1. 14.

(*g*) Com. Dig. Condition, [B.] 1.

(*h*) *Scott* v. *Tyler*, 2 Bro. C. C. 487.

performance of the condition (*i*)? So a bequest to *B*, to be at her disposal if she marry with the consent of *F.* and *M.* (or their trustees, if they, viz. *F.* and *M*, die before such marriage), and not otherwise; *B.* dying at thirteen, and unmarried, renders the bequest nugatory, by reason of the impossibility of performing the condition (*k*). In these cases the performance of the condition must precede the vesting of the legacy; and the limitation of time for the performance of the condition, forms part of the substance of the gift (*l*). The same rule applies both to legacies charged on real estate, or on personal property (*m*). A bequest may indeed be absolute as to the interest, and conditional as to the principal (*n*). In *Booth* v. *Booth*, 4 Ves. 399, a distinction was taken where the bequest was of a *residue*, and the principal was

(*i*) *Ellis* v. *Smith*, 1 Sch. & Lef. 1; *Loyd* v. *Branton*, 3 Meriv. 116; *Malcolme* v. *O'Callaghan*, 2 Madd. 349: it would according to *Randal* v. *Payne*, 1 Bro. C. C. 55.

(*k*) *Cray* v. *Ellis*, 2 P. W. 531; *Atkins* v. *Hiccocks*, 1 Atk. 500; *Elton* v. *Elton*, 1 Ves. 6; S. C. 3 Atk. 504; *Slackpole* v. *Beaumont*, 3 Ves. 97; *Monkhouse* v. *Holme*, 1 Bro. C. C. 300; *Lowther* v. *Cavendish*, 2 Eden, 117; S. C. Ambl. 356, and 3 Bro. Parl. C. 349; *Clarke* v. *Parker*, 19 Ves. 1; *Ashton* v. *Harvey*, 1 Atk. 374.

(*l*) *Garbut* v. *Hilton*, 1 Atk. 381; Co. Litt. 205 b.; *Reynish* v. *Martin*, 3 Atk. 332.

(*m*) *Reynish* v. *Martin*, 3 Atk. 334; *Ashton* v. *Harvey*, 1 Atk. 374.

(*n*) *Pink* v. *De Thusey*, 2 Madd. 157.

given absolutely to trustees, in trust to apply the interest to the testator's daughters till marriage, and *then* (viz. on marriage), to pay them the principal, and the legacy was held to be vested, because it was a residuary bequest, notwithstanding one of the daughters died unmarried; but this case, it is apprehended, rather falls under the head of an immediate bequest, vested by the gift of interest, though directed to be paid at a future time (*o*). So a bequest on condition, to release claims within a limited time, falls under this class (*p*); and by filing a bill to redeem a mortgage, the legacy will be forfeited (*q*). By acceptance of such a legacy an election is made, which will bind the legatees executors (*p*), and in such case the executors must release. A bequest may be on condition to release an annuity (*r*), or that the legatee pay a sum of money (*s*), or that he give up bad company, or other similar conditions (*t*).

(*o*) *Love* v. *L'Estrange*, 3 Bro. P. C. 337; S. C. cited in *Hanson* v. *Graham*, 6 Ves. 248.

(*p*) *Earl of Northumberland* v. *Earl of Aylesbury*, Ambl. 540; *Simpson* v. *Vickers*, 14 Ves. 341.

(*q*) *Vernon* v. *Bithell*, 2 Eden, 110.

(*r*) *Taylor* v. *Popham*, 1 Bro. C. C. 168.

(*s*) *Lewis* v. *King*, 2 Bro. C. C. 603; *Ex parte English*, 2 Bro. C. C. 610.

(*t*) *Tattersall* v. *Howell*, 2 Meriv. 26.

quest to an executor is on the implied con- he prove the will (*u*), and act as executor; fore, if he refuse the executorship, or act position to the will, he will forfeit his nary legacy; though it is said not his mbrances for rings and mourning. If a tor expresses, that a bequest to an executor be considered as a token of regard, and ble within twelve months, then the conse- ce of not acting does not follow (*x*): nor a forfeiture take place, when the legacy is to an executor for loss of time (*y*); and ecepting the office, an executor entitles him- to his legacy before probate (*z*). A bequest be conditional, and not to take effect ex- on the happening of particular events; as e a testator declared, if he died before he rned from Ireland, he bequeathed 100*l.* to the testator having returned, the event did happen on which the bequest was given, and efore it failed (*a*). Such conditional be-

Swinb. 391; *Abbott* v. y, 3 Ves. 149; *Harford* rning, 1 Cox, 302; *Har-* v. *Rowley*, 4 Ves. 216; erston v. *Humberston*, 1 . 333; *Read* v. *Devaynes*, . C. C. 95; 2 Cox Rep. *Stockpole* v. *Howell*, 13 421; *Freeman* v. *Fairlie*, riv. 31.

(*x*) *Brydges* v. *Wotton*, 1 Ves. & B. 137.

(*y*) *Harrison* v. *Rowley*, 4 Ves. 212; *Roach* v. *Haynes*, 8 Ves. 593.

(*z*) *Harrison* v. *Rowley*, 4 Ves. 216.

(*a*) *Parson* v. *Lanoe*, 1 Ves. 191.

quest may fail by reason that the legatee did not appear at a certain place specified, as the condition on which he was to be entitled to his legacy (*b*); or because he did not claim the same within a limited time, &c. (*c*); and though the legatees were ignorant of the condition, yet the bequests will fail.

The adverbs of time, as *when* (*d*), and *then* (*e*), may constitute conditions of the first denomination, provided these adverbs form part of the substance of the gift, as distinguished from the period marked out for payment of the legacy: as I give *A.* 100*l.* *when* he attains twenty-one (*f*); or I give *B.* 100*l.* at twenty-one, if *then* living (*g*):—as distinguished from, I bequeath 100*l.* to *A*, to be paid when he attains twenty-one; or I give *B.* 100*l.*, and when he attains twenty-one, *then* I direct the same to be paid to him (*h*). So *if*, or *provided* (*i*),

(*b*) *Talk* v. *Houlditch*, 1 Ves. & B. 248; 3 Ves. 317.

(*c*) *Burgess* v. *Robinson*, 3 Meriv. 7; *Careless* v. *Careless*, 1 Meriv. 384; S. C. 1 Madd. 172.

(*d*) Swinb. 379.

(*e*) *Laffer* v. *Edwards*, 3 Madd. 210.

(*f*) *Sherman* v. *Collins*, 3 Atk. 321; *Hanson* v. *Graham*, 6 Ves. 243.

(*g*) *Miles* v. *Leigh*, 1 Atk. 574; 1 P. W. 566, n. 2; *Duke of Manchester* v. *Binham*, 3 Ves. 61; *Pyle* v. *Price*, 6 Ves. 779.

(*h*) *May* v. *Wood*, 3 Bro. C. C. 472; *Stonehouse* v. *Evelyn*, 3 P. W. 252.

(*i*) Swinb. 379, 380, n.; Co. Litt. 204 a, b.

d in *case*, constitute conditions of this class; where a testator bequeathed various legacies the amount of 800*l.*, and willed that if, or ovided, or in case, his rent-charge should on sale produce 1,000*l.*, *then* he gave 100*l.* to and 100*l.* to *B.*; the rent-charge produced ore than 800*l.* on its sale, but not 1,000*l.*, and was held that *A.* and *B.* were not entitled (*k*). *onditions subsequent* are such as are to be rformed after the vesting of the legacy, and i failure of performance the legacy will be feated, provided the same be given over (*l*); herwise the conditions are said to be *in terrem* only and nugatory (*m*); as a bequest of a idue to a wife for life, but if she marry again, e-half to go over to the testator's brother; re the bequest to the wife is vested subject to defeated by a conditional limitation, and is continue during her widowhood, and on her cond marriage she will be entitled to a moiety ly, which will devolve on her husband, *jure riti* (*n*), unless there be a settlement. So

(*k*) *Stonehouse* v. *Evelyn*, 3 W. 252.

(*l*) Com. Dig. Condition. [C.] st. Shepp. T. 450; *Harvey* shton, 1 Atk. 378, 380, n. 1; rke v. *Parker*, 19 Ves. 14; yd v. *Branton*, 3 Meriv. 117.

(*m*) *Bellasis* v. *Ermine*, 1 Chan. C. 22, 58; *Webb* v. *Webb*, 1 P. W. 136, n. 1; *Reynish* v. *Martin*, 3 Atk. 331; *Loyd* v. *Branton*, 3 Meriv. 117.

(*n*) *Lucas* v. *Evans*, 3 Atk. 260.

where a bequest was in favour of a testator's daughter; but if she should marry without the consent of his trustees, then for the daughter's life only, and after her death for the benefit of her children: on the daughter's marriage without the requisite consent, it was held she was entitled for life only, even though she had not any children of that marriage, since she might marry again, and have children by a subsequent, as well as by her present marriage (*o*). So a bequest may be made to *A*, to be void on assignment (*p*), and on taking the benefit of the insolvent debtors act, the bequest will cease, as to *A*, if given over.

It may be observed that Lord Talbot said, "There are not any technical words to distinguish conditions precedent and subsequent, but the same words may indifferently make either, according to the intent of the party who creates them (*q*)." And the same words have been held to operate as the one or the other sort of condition, according to the intent of the testator; see P. Shepp. T. 117, n. 3. Nor is the

(*o*) *Champion* v. *Pickax*, 1 Atk. 471.

(*p*) *Shee* v. *Hall*, 13 Ves. 404; *Wilkinson* v. *Wilkinson*, 2 Wils. 47; *Dommett* v. *Redford*, 3 Ves. 149.

(*q*) *Sir J. Robinson* v. *Cumyns*, Cas. T. Talb. 166; see also Swinb. 392, and n.

construction governed by the circumstance, that the clause of condition is placed in a will prior, or posterior, to the bequest.

It may be further remarked, that where the time appointed for payment arrives, the subsequent failure, or even breach of the condition, does not affect the right of the legatee to receive his legacy (*r*). A direction that a legacy, on nonperformance of the terms or conditions specified, shall sink into the residue, is a sufficient bequest over to render the condition effectual (*s*); though it is doubted whether a residuary bequest is sufficient (*t*). So where an estate is exonerated, or the money, if raised out of land, is directed to be paid to the person entitled to the reversion, on a nonperformance of the condition these are considered tantamount to a devise or bequest over, and render the condition imperative (*u*); according to this last case, the mere bequest of the surplus, or residuary bequest, is sufficient to render the condition of

(*r*) *Brydges* v. *Wotton*, 1 Ves. & B. 137; *Osborne* v. *Brown*, 5 Ves. 527.

(*s*) *Wheeler* v. *Bingham*, 3 Atk. 367; *Loyd* v. *Branton*, 3 Meriv. 118:—*Ashton* v. *Harvey*, 1 Atk. 378; *Scott* v. *Tyler*, 2 Bro. C. C. 487, are *contrà*.

(*t*) *Loyd* v. *Branton*, 3 Meriv. 118; where the former cases are cited.

(*u*) *Ashton* v. *Harvey*, 1 Atk. 375.

avail. Where to a bequest was added a provision, that if the legatee disputed the will under which he claimed he should forfeit his legacy, this provision was held to be a condition subsequent, and *in terrorem* only (*x*); but if there had been a bequest over on breach of the condition, the bequest over would have been binding and effectual (*y*). Although a condition be *in terrorem* only, yet, if an additional bequest be given, even to a child, on performance of the condition, the condition must be performed to entitle such legatee to the additional benefit (*z*). It is observable, that in *Crowder* v. *Clowes*, 2 Ves. J. 450, substituted and additional legacies were ordered to be raised out of the same fund, and to be subject to the same conditions as the original legacies.

On a bequest of a diamond on condition, the sale of the diamond by the legatee has been held an acceptance (*a*) of the legacy. So receiving interest has been considered evidence of acceptance of a legacy on condition (*b*); and such

(*x*) *Morris* v. *Burroughs*, 1 Atk. 404.

(*y*) *Cleaver* v. *Spurling*, 2 P. W. 528.

(*z*) *Gillet* v. *Wray*, 1 P. W. 284.

(*a*) *Earl of Northumberland* v. *Earl of Aylesbury*, Ambl. 544.

(*b*) *Ibid.*

conditional legacy is considered to create a contract or a debt, and by acceptance the condition is annexed thereto (*c*).

Where a bequest was to *A*, on condition she married a person of the name of *B*; *C*. assuming the name of *B*, and then *A*. marrying him, was held a good compliance with the condition (*d*). Conditions of marriage, annexed to bequests, are gone by marriage of the legatees in the testator's lifetime, and the bequests become absolute (*e*). Where a bequest was made to *A*, but if she married without the consent of the executors, or the major part of them, before twenty-one, then the bequest was given over to the children of her sister, who was the wife of the defendant, and the testator made the defendant and two others executors: the defendant having allowed a courtship to be carried on in his own house, and by his son; and the marriage taking place in the house of the defendant, and with his privity, and the other executors having notice, and not objecting to the match, or re-

(*c*) *Earl of Northumberland* v. *Earl of Aylesbury*, Ambl. 545.

(*d*) *Barton* v. *Bateman*, 3 P. W. 65, over-ruled; *vide* 4 Bro. Parl. Cas. 194, where it is said, *arguendo*, an Act of Parliament is necessary for this purpose; see also *Robinson* v. *Robinson*, 3 Atk. 737.

(*e*) *Cromelin* v. *Cromelin*, 3 Ves. 233; *Parnell* v. *Lyon*, 1 Ves. & B. 484; *Clarke* v. *Berkeley*, 2 Vernon, 721; *Harslop* v. *Whitmore*, 1 P. W. 682.

moving *A*; *A*. was held entitled from the tacit consent which was given, especially as she was defendant was committing a *fraud* in favour of his children, and because there was not any form prescribed to the assent (*f*).

Courts have struggled hard to support such bequests, where there has been an encouragement of the courtship by the persons whose consent is made requisite; and have held a conditional assent to be binding, where the terms proposed have been performed subsequent to the marriage (*g*); as in *Wynn* v. *Williams*, 5 Ves. 130, where a bequest was to daughters for their portions, on condition they should marry with consent, and on condition that the persons with whom they respectively should marry, should settle 3,000*l*., or the value thereof, on the intended wife and her children. The marriage took place with the necessary consent, but the settlement was not made as directed, owing to a mistake of all parties and the neglect of the trustee: the husband being able and ready to make the requisite settlement, which was deemed insufficient by the trustee; under these circumstances, it was

(*f*) *Mesgrett* v. *Mesgrett*, 2 Vern. 580. Atk. 264, & n. 1; S. v. *Smith*, Ambl. 263 v. *Lord Netterville*,

(g) *Daley* v. *Desbouverie*, 2

the trustee should pay the portion, on a proper settlement, to the given amount, being executed.

In *Harvey* v. *Ashton*, 1 Atk. 374 (*h*), the condition of marriage with consent of trustees, was held satisfied by the consent of the major part of them; this doctrine has been, however, questioned, and the distinction stated to be (*i*), that where a trustee has withheld his consent for a vicious or unreasonable purpose, that shall not be permitted to affect the consent given by the majority, where it was reasonable that they should consent (*k*). In *D'Aguilar* v. *Drinkwater*, 2 Ves. & B. 237, where two of three trustees gave their consent in writing, and the third in effect wrote to the other two, "If you consent, I consent;" it was held, under the circumstances, a sufficient consent of all three. It has also been decided, that if the requisite consent be obtained conditionally, if the conditions are not complied with, the consent cannot be considered as obtained, so as to prevent a forfeiture (*l*). Consent given generally by a trustee has been held sufficient (*m*).

(*h*) *Clark* v. *Parker*, 19 Ves. 15, contrà; *Mercer* v. *Hall*, 4 Bro. C. C. 326.

(*i*) Per *Lord Eldon*, 19 Ves. 15.

(*k*) As in *Strange* v. *Smith*, Ambl. 263, and in *Mesgrett* v. *Mesgrett*, ante.

(*l*) *Dashwood* v. *Lord Bulkely*, 10 Ves. 239.

(*m*) *Pollock* v. *Croft*, 1 Meriv. 187.

And again, a bequest to the use of *A*, to be paid and transferred to her on her marriage, with the previous consent in writing of her mother, if living, and if dead with the consent of her father; and in case she should marry without consent, the legacy to be settled to the separate use of herself and children, &c.: a general consent was given by the father and mother to *A*, to marry whom she pleased; *A*. married after the death of her father and mother, and it was held that the consent was confined to the lives of the father and mother, and the survivor of them, and therefore the condition had ceased to be binding (*n*). Again, where a bequest was of leaseholds to *A*. for life, and then over, on condition *A*. should see the fines of renewal, and the interest of a mortgage paid, and be consulted as to the manner of raising the fines, that she might give her approbation as she might think proper; it was held she was only to keep down the interest (*o*). It has been held that a condition to provide maintenance does not extend to education. If a condition to be performed subsequent to the vesting of the interest become impossible, the legatee will be

(*n*) *Mercer* v. *Hall*, 4 Brown, 328.

(*o*) *Collier* v. *Collier*, 3 Ves. 33; *Buckeridge* v. *Ingram*, 2 Ves. 652; over-ruled, see *White* v. *White*, 9 Ves. 554; 2 Ves. & Beam. 65.

entitled absolutely (*p*). An implied consent may likewise, according to the case of *Harvey* v. *Ashton*, 1 Atk. 374, be a good performance of such a condition; but the case of *Clark* v. *Parker*, 19 Ves. 15, is *contrà*. The acceptance of a bequest on condition to release claims, amounts to a release in equity, and the same is therefore a compliance with the testator's conditions (*q*); but not if an heir-at-law enters, for in such case it is said, the legatee must actually perform the condition (*r*).

As before observed, if the condition subsequent become impossible by the act of God, the condition will be void, and the bequest become absolute; as where a bequest was to *A*, provided she married with the consent of *C*. and *D*, if they die before such marriage, *A*. will be absolutely entitled (*s*). And where a condition is enjoined, which may be performed at any time by the legatee, he will have his whole life to perform it (*t*). A forfeiture does not

(*p*) *Aislabie* v. *Rice*, 3 Madd. 257.

(*q*) *Earl of Northumberland* v. *Earl of Aylesbury*, Ambl. 658; *Franco* v. *Alvares*, 3 Atk. 342.

(*r*) *Simpson* v. *Vickers*, 14 Ves. 347.

(*s*) *Peyton* v. *Bury*, 2 P. W. 627; Com. Dig. Condition [D.] 1; *Jones* v. *Lord Suffolk*, 1 Bro. C. C. 528, and cases cited.

(*t*) *Randall* v. *Payne*, 1 Bro. C. C. 55; *Gulliver* v. *Ashby*, 4 Burr. 1929.

attach in equity on nonperformance of a condition, if the parties can be put in the same situation as if the condition had been performed (*u*) and equity will in some cases enlarge the time for the performance of a condition (*x*); but where there is a bequest over, on failure of performance of the condition, equity will not relieve (*y*).

(*u*) *Taylor* v. *Popham*, 1 Bro. C. C. 168; *Davis* v. *West*, 12 Ves. 474; Co. Litt. 237 a, n. 1.

(*x*) *Eastwood* v. *Vincke*, 2 P. W. 617; *Vernon* v. *Stevens*, 1 P. W. 68; *Gulliver* v. *Ashby*, 4 Burr. 1929.

(*y*) Swinb. 396, and note; 415, ib.; *Cleaver* v. *Spurling*, 2 P. W. 529; *Clay* v. *Willis*, 2 P. W. 532; *Simpson* v. *Vickers*, 14 Ves. 346; Swinb. 416, and note.

## CHAP. VI.

### *Of Accumulative Legacies.*

GENERALLY where a legacy to the same, or to a less, or a greater amount (*a*) is given, by the same person, by a will and codicil, or by two codicils or other testamentary papers, they are to be considered accumulative (*b*); especially if the legacies are payable out of different funds, as one out of real, and the other out of personal estate, or if one be absolute, and the other contingent (*c*); but if two legacies of the same amount are given, to the same person, by the same instrument, especially if for the same cause, the legatee shall take one only (*d*). In case the amount is different, or if two legacies are given for different causes, the legatee shall

(*a*) *Hooley* v. *Hatton*, 1 Bro. C. C. 390, n.; S. C. 2 Dick. 491; *Hurst* v. *Beach*, 5 Madd. 358; *Ridges* v. *Morrison*, 1 Bro. C. C. 388; *Coote* v. *Coote*, 1 Bro. C. C. 448; Swinb. 1028.

(*b*) *Masters* v. *Masters*, 1 P. W. 423; *Wright* v. *Lord Cadogan*, 2 Eden, 239; Ambl. 468; *Clive* v. *Walsh*, 1 Bro. C. C. 146.

(*c*) *Hodges* v. *Peacock*, 3 Ves. 737.

(*d*) *Garth* v. *Merick*, 1 Bro. C. C. 30; *Curry* v. *Pyle*, 2 Bro. C. C. 225; *Holford* v. *Wood*, 4 Ves. 76, 91; *Coote* v. *Boyd*, 2 Bro. C. C. 529; *Campbell* v. *Radnor*, 1 Bro. C. C. 271; Swinb. 1028.

take both legacies, though given by the same instrument (*e*). So if one legacy is given absolutely, and another subject to a condition (*f*), or if the legacies differ by a variation in the times and mode of payment (*g*), the legatee shall take both legacies, whether given by the same or different instruments; unless the two wills, codicils, or other testamentary papers are exactly a transcript one of the other; in which case, the latter instrument and its contents may be considered a substitution, or repetition of the former, and its contents. Again, where a second codicil was begun on a first codicil, and then written out on a separate paper, and the will only was referred to, and not the first codicil; legacies to *nearly* the same amount in the first and second codicils, were considered as repetitions only (*h*). So where a testator gave legacies to his wife by his will and codicil, and on his death-bed ordered his servant to deliver to his wife two bank notes amounting to 6,000*l*., the testator saying, at the time of such delivery, "he had not done enough for his dear wife," it was held these

(*e*) *Curry* v. *Pile*, 2 Bro. C. C. 225.

(*f*) *Hodges* v. *Peacock*, 3 Ves. 735.

(*g*) *Jeacock* v. *Faulkener*, 1 Bro. C. C. 295; *Currie* v. *Pye*, 17 Ves. 462.

(*h*) *Moggridge* v. *Thackerell*, 3 Bro. C. C. 527; S. C. 1 Ves. 474.

bequests were additional: and the presumption of satisfaction was rebutted by the expressions of the testator (*i*). Where a testator gave 500*l.* to *A*, to whom he owed 300*l.*, it was held such legatee should take both his legacy and debt; it is to be observed, that in this last case *A.* was likewise made executor, and by his answer admitted that he was, contrary to his legal right, liable to account for the surplus (*k.*) Again, where *A.* gave a legacy to *B.* by his will, and appointed *C.* his wife executrix; *C.* by her will gave to *B.* a larger and more beneficial legacy than that which he took under the will of her husband; yet it was held these were several and accumulative bequests; besides, they were given by different persons (*l*). So where an annuity was given till a certain legacy, which was given by a will made before the grant of the annuity, should be paid, and which will was afterwards revoked, it was held the annuity should continue notwithstanding another and a less annuity was given to the annuitant, by a second will (*m*). The second will however in this case, gave the legacy

(*i*) *Miller* v. *Miller*, 3 P. W. 358.

(*k*) *Rawlins* v. *Powell*, 1 P. W. 298; see chap. *Satisfaction.*

(*l*) *Crumpton* v. *Sale*, 2 P. W. 555, n. 2.

(*m*) *Crosbie* v. *Murray*, 1 Ves. J. 557.

over and above the annuity, which the testator mentioned he had secured to the annuitant for his life (*m*). Again, where a bequest was made to *A.* when he attained twenty-one, with interest for maintenance in the mean time, till he arrived at twenty-one, and then a bequest in the same will of 5,000*l.* to him; *A.* the legatee, was held entitled to both legacies (*n*). Courts of equity however lean, in favour of the heir, against the construction of double legacies being given to children (*o*); such doctrine does not, however, prevail between children and collaterals or strangers, but whether a portion shall be accumulative or not, in such cases, will depend entirely, said Lord Hardwicke in *Johnson* v. *Smith*, 1 Ves. 317, (*vide*, however, *Rye* v. *Dubost*, 18 Ves. 132), on the intent of the testator; and even *small* circumstances of difference, where the *value* is substantially the same, will, in the case of a parent and child, only entitle the child to one bequest (*p*). This presumption of law in favour of an additional legacy may be repelled by small circumstances (*q*).

(*m*) *Crosbie* v. *Murray*, 1 Ves. J. 257.

(*n*) *Curry* v. *Pile*, 2 Bro. C. C. 225.

(*o*) *Blake* v. *Bunbury*, 1 Ves. J. 525; *Copley* v. *Copley*, 1 P. W. 148; *Barret* v. *Beckford*, 1 Ves. 520.

(*p*) *Twisden* v. *Twisden*, 9 Ves. 426.

(*q*) *Osborne* v. *D. of Leeds*, 5 Ves. 384.

The presumption may also be repelled by internal evidence of an intended substitution (*r*), and also by circumstances existing at the date of a codicil (*s*.) So where a legacy to the same amount is given for the same cause (*t*), or expressly in lieu of a former legacy (*u*), the presumption of additional bequests is repelled.

## CHAP. VII.

### *Executors and Legatees Trustees.*

WE have seen that an executor, or residuary legatee, stands in the same situation with regard to the personal estate, as an heir-at-law does to real estate; taking whatever falls into the personal estate, as the heir takes whatever is undisposed of the real estate (*a*). An exe-

(*r*) *Allen* v. *Callow*, 3 Ves. 289; *Osborne* v. *D. of Leeds*, 5 Ves. 369.

(*s*) *Allen* v. *Callow*, 3 Ves. 293; *Barclay* v. *Wainwright*, 3 Ves. J. 462; *St. Albans* v. *Beauclerk*, 3 Atk. 642; *Coote* v. *Boyd*, 2 Bro. C. C. 521; *Attorney General* v. *Harley*, 4 Madd. 263.

(*t*) *Benyon* v. *Benyon*, 17 Ves. 34; *Hurst* v. *Beach*, 5 Madd. 358.

(*u*) *Cooper* v. *Day*, 3 Meriv. 154.

(*a*) *Wilkinson* v. ———, 1 Vern. 23; *Hornsby* v. *Finch*, 2 Ves. J. 79; *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. S. 83; *Clennel* v. *Lewthwaite*, 2 Ves. J. 474; *Foster* v. *Mount*, 1 Vern. 473; *Gran-*

4.) to purchase leasehold premises for the life of *C.* the testator's kinsman; but if leasehold premises could not be obtained, then the testator directed the surplus of his estate to be paid to *C.* and made *D.* his executor *in trust* only, giving him a small legacy; it was held that *C.* should be entitled to the leaseholds which were purchased by *D.* according to the directions of the will. A bequest to a sole executor, or equal bequests to several executors, even though for rings (*l*), and whether such bequest be of the residue or not (*m*), of itself converts them into trustees (*n*); and this is from the inconsistency, and presumption that by giving a *part*, the testator did not intend his executor should take *all* the residue. An executor is converted into a trustee by his answer in equity, acknowledging he is accountable for the surplus of the personal estate, though the testator might intend him to take beneficially (*o*). And whether the wife be the

(*l*) *Nisbett* v. *Murray*, 5 Ves. 158.

(*m*) *Rachfield* v. *Careless*, 2 P. W. 159; *Blinkhorn* v. *Feast*, 2 Ves. S. 29.

(*n*) *Muckleston* v. *Brown*, 6 Ves. 64; *Abbot* v. *Abbot*, 6 Ves. 344; *Forster* v. *Mount*, 1 Vern. 473; *Nichols* v. *Crisp*, Ambl. 768; *Petit* v. *Smith*, 1 P. W. 7; *Rutland* v. *Rutland*, 2 P. W. 210; *Dawes* v. *Dawes*, 3 P. W. 40; *Lawson* v. *Copeland*, 2 Bro. C. C. 156; *Bull* v. *Kingston*, 1 Meriv. 315; *King* v. *Denison*, 1 Ves. & B. 277.

(*o*) *Rawlins* v. *Powell*, 1 P.

trix or no, the foregoing construction is varied (*p*). In *Dicker* v. *Lambert*, 4 Ves. an executrix was held a trustee for the next n of the testator, by taking a life interest veral specified articles, and in the general re- ry personal estate of the testator, and where her death legacies were charged on a par- ar part of the fund. Again, making one l the next of kin legatees, does not alter ase (*q*). And where the bequest to the tor was of 5*l.* for his trouble, notwith- ling the solicitor who drew the testator's swore, that at the time of making the the testator declared his executor should the residue (*r*): still, by taking a benefit esaly under the will, an intention in the tor was held to be disclosed sufficient to ude the executor in equity from taking general residue beneficially (*s*). A direction

8; 1 P. W. 545, n. 1; . *Nab*, 10 Mod. 404.

*Randal* v. *Bookey*, 2 424; *Farrington* v. *tly*, 1 P. W. 551; *Dean lton*, 2 Bro. C. C. 636; hstanding *Ball* v. *Smith*, n. 67.

*Rutland* v. *Rutland*, 2 213; *Bagley* v. *Powell*, 1. 361; *Andrew* v. *Clark*, s. 162; *Farrington* v. *Knightly*, 1 P. W. 551; *Lord North* v. *Purdon*, 2 Ves. S. 496; notwithstanding *Attorney General* v. *Hooper*, 2 P. W. 340.

(*r*) *Rachfield* v. *Careless*, 2 P. W. 159; *Blinkhorn* v. *Feast*, 2 Ves. S. 29.

(*s*) *Granvill* v. *Beaufort*, 1 P. W. 114; *Langham* v. *Sandford*, 17 Ves. 443; S. C. 2 Meriv. 17.

that an executor shall be paid for his trouble, likewise converts him into a trustee (*t*); and even where one of the executors only took a legacy under a codicil, and the other executors were not mentioned beneficially either in the will or codicil, and the testator said he hoped they would see the trusts of his will duly performed: it was held the executors were mere trustees, and not beneficially entitled to the residue (*u*). In *De Mazar* v. *Pybus*, 4 Ves. 648, executors were declared *trustees*, though neither of them took any thing, from the *intention*; especially as they constituted a *partnership* firm, the number of which might at any time be varied. A bequest to one of several executors generally, does not exclude them (*x*); nor does a bequest of unequal legacies to all the executors (*y*); though it is said in *White* v. *Evans*, 4 Ves. 22, a bequest to one of two executors for his care, converts both into trustees for the next of kin. It is said also, that a bequest of plate to an executor for life only, with remainder to another, does not disclose a

(*t*) *Dean* v. *Dalton*, 2 Bro. C. C. 636.

(*u*) *Robinson* v. *Taylor*, 2 Bro. C. C. 594.

(*x*) *Blinkhorn* v. *Feast*, 2 Ves. 29.

(*y*) 1 Bro. C. C. 328; *Oliver* v. *Freiven*, 1 Bro. C. C. 589 = *Rawlings* v. *Jennings*, 13 Ves. 46.

sufficient intention to exclude him from the residue (*z*). Neither is the bequest of a term to an executor, or to one of several executors (*a*), for life, sufficient to deprive him as executor, being, as it is said, a mere exception (*b*). But if to the bequest of a life or specific interest, other bequests are given, (even to a wife as an executrix) absolutely, or if a life interest is given to an executor in part of the residue (*c*), such executrix or executor will, it is said, be converted into a trustee (*d*). Making a provision out of real estate for a sole executor, or for one of two executors, will not convert him or them into trustees. Neither are executors, it is said, deemed trustees, where there are several executors, and each has a specific legacy (*e*), by reason of the inequality; especially if, to such specific bequests, are added legacies of unequal

(*z*) *Ball* v. *Smith*, 2 Vern. 678; *Granville* v. *Beaufort*, 1 Bro. P. C. 305; *Granvill* v. *Beaufort*, 1 P. W. 117, n. 1; *Farrington* v. *Knightley*, 1 P. W. 551; confirmed 4 Ves. 731.

(*a*) *Bishop of Cloyne* v. *Young*, 2 Ves. 97.

(*b*) *Westcomb* v. *Jones*, 1 P. W. 552; *Blinkhorn* v. *Feast*, 2 Ves. S. 29; *Leach* v. *Lambert*, 4 Bro. C. C. 326; contra. Commented on 4 Ves. 728.

(*c*) *Dicks* v. *Lambert*, 4 Ves. 729.

(*d*) *Nourse* v. *Finch*, 4 Bro. C. C. 249; *Walker* v. *Jackson*, 2 Atk. 626; *M'Cleland* v. *Shaw*, 2 Sch. & Lef. 542.

(*e*) *Bishop of Cloyne* v. *Young*, 2 Ves. S. 97.

value (*f*): though, according to *Southcot* v. *Watson*, 3 Atk. 232, every bequest, whether general or specific, excludes an executor, unless the bequest is given,

1st, By way of particular interest, or usufructury estate, out of a legacy given to another person:

2d, By way of exception; and,

3d, Where it is given for the sake of some trust, which the executor has to perform.

Executors are sometimes also trustees for heirs-at-law; for wherever an executor becomes possessed of money, the produce of real estate, and the same money is not wanted for the purpose for which it was raised,—as by reason of the death of legatees before the time of payment; or where the bequest is void, as a bequest of money, so raised to a charity (*g*); in such cases the money must be considered as part of the real estate, undisposed of; and the same will belong to the testator's heir-at-law (*h*), unless the real estate was, by the testator, changed

(*f*) *Blinkhorn* v. *Feast*, 2 Ves. S. 29; *Walker* v. *Jackson*, 2 Atk. 626.

(*g*) *Arnold* v. *Chapman*, 1 Ves. S. 111; *Currie* v. *Pye*, 17 Ves. 466.

(*h*) *Hutcheson* v. *Hammond*, 3 Bro. C. C. 148; *Spink* v. *Lewis*, 3 Bro. C. C. 355; *Cruse* v. *Barley*, 3 P. W. 22, & n. (1); *Currie* v. *Pye*, 17 Ves. 463; *Denison* v. *King*, 1 Ves. & B. 279.

in its nature, and converted, as it is termed, out and out, into personalty. A distinction is made, and it is said (*i*) that the realty shall be considered, in some cases, as converted for the benefit of a residuary legatee, but not for the next of kin. In *Collins* v. *Wakeman*, 2 Ves. J. 683, the real estate was directed to be converted into personalty, and the testator gave legacies to his heir and next of kin, yet the surplus of the realty was decreed to the heir. It may further be observed, that the heir will be entitled whenever the devise can be confined to trustees for a particular object; but if devisees take beneficially, subject to or chargeable with annuities or legacies; or if, by any reasonable construction, it appears that the devisees were to take beneficially, subject only to certain charges, the heir will not be entitled, but the charges will sink in favour of the devisees (*k*). It is said, however, a devise to other than the heir-at-law, on *condition* to raise a sum, &c. though for an object which is void, the money, must be raised, or the heir may take advantage of the condition, and of course he will take the

(*i*) *Ackroyd* v. *Smithson*, 1 Bro. C. C. 514; *Fletcher* v. *Ashburner*, Ib. 495; *Cruse* v. *Barley*, 3 P. W. 22.

(*k*) *King* v. *Denison*, 1 Ves. & B. 279.

money so raised, as part of the realty undisposed of (*l*).

Legatees may likewise be trustees, for although a bequest is given to one, yet such legatee may be merely a trustee for the benefit of others. It is a rule of the Court of Equity, that wherever a person gives any property, and clearly points out the object, the property, and the way in which such property shall devolve, a trust is created, unless the legatee has a controlling power to defeat such intention of the testator (*m*); and such a trust is created, under the foregoing circumstances, by the words *recommend*, *desire* (*n*), *dying request* (*o*), or *willing*; as *willing* a person, who is appointed executor, to pay debts. So words of *entreaty*, under the foregoing circumstances, have been

(*l*) *Arnold* v. *Chapman*, 1 Ves. S. 111; *Wright* v. *Row*, 1 Bro. C. C. 61.

(*m*) *Malin* v. *Keightley*, 2 Ves. J. 335; *Harland* v. *Trigg*, 1 Bro. C. C. 142, 179; *Harding* v. *Glyn*, 1 Atk. 469; *Pushman* v. *Filliter*, 3 Ves. 9; *Moggridge* v. *Thackwell*, 3 Bro. C. C. 528; Swinb. 465, *et seq.* and notes.

(*n*) Case *ante* (*m*); *Lewis* v. *King*, 2 Bro. C. C. 603; *Malcott* v. *Brucey*, 1 Ves. 208, where it is said "desire" expresses the will of a testator, and amounts to a legacy; though *Randall* v. *Hearle* is contra, 1 Anst. 124; *Clowdsly* v. *Pellham*, 1 Ver. 411; *Forbes* v. *Bull*, 3 Meriv. 427.

(*o*) *Pierson* v. *Garnet*, 2 Bro. C. C. 45; *Spange* v. *Barnard*, 2 Bro. C. C. 587; *Pierson* v. *Garnet*, 2 Bro. C. C. 225; *Morice* v. *Bishop of Durham*, 10 Ves. 536.

held to raise a trust in a legatee (*p*); and the same doctrine applies, notwithstanding a power may defeat such trust (*q*). A trust may however, be confined in its object; as where a bequest was to *A*, the testator's widow, of the residue of his personal estate, "on trust during her life to provide for *B*," the testator's daughter; with a further clause, "on the decease of *A*, for her to dispose of *what shall be left* among my children, in such manner as she shall think proper;" it was held that *A*. was absolutely entitled, subject only to the provision directed to be made for *B*. during *A*.'s lifetime (*r*). Again, where a testator, after giving several legacies to his children, gave his ready money, goods, &c. to his wife, upon trust and confidence that she would dispose thereof, but for the benefit of her children; the wife was decreed to be a trustee for all her children: and an appointment by her to one of the children of five shillings only, was deemed an illusory appointment, and an equal distribution among the children was decreed (*s*). Again, where under a general bequest to a wife, the testator said, he made

(*p*) *Prevost* v. *Clarke*, 2 Mad. Rep. 458.

(*q*) *Malin* v. *Barker*, 3 Ves. 150.

(*r*) *Pushman* v. *Filliter*, 3 Ves. 9.

(*s*) *Gibson* v. *Kinven*, 1 Vern. 66; sed vide *Butcher* v. *Butcher*, 1 Ves. & Bea. 79.

no provision for his daughter, knowing it was his wife's happiness, as well as his, to see his daughter comfortably provided for; with a further provision, that in case of death happening to his dear wife, he requested his friends *S.* and *H.* to take care of, and manage to the best for his daughter, all and whatever he might die possessed of; the testator's widow married again, and settled one-third of the property on her daughter; but on a bill filed in equity, it was decreed the mother was entitled for life only, with remainder to her daughter; and the mother was decreed to provide for her daughter during her life (*t*). In *Wainwright* v. *Waterman*, 1 Ves. J. 314, a testator desired his executors to nominate two of his sons partners in his trade, which the executors were to carry on, when they attained twenty-one, with a bequest to the sons when they should become partners; and the testator directed the same to sink in the residue if the sons should die before twenty-one, or should refuse to become partners. By a codicil the testator left it entirely at the option of the executors either to appoint John a partner, *or not*, if not, the legacy given to him was to be void. Two of the three executors refused to appoint John a partner. The other

(*t*) *Nolan* v. *Milligan*, 1 Bro. C. C. 492.

being ready to appoint him a partner, and no dissent being made by the two other executors when the son attained twenty-one, he was held to be entitled. So where a testator directed, by a codicil to his will, that *A*, a legatee, should leave 500*l*., part of a legacy given to him by the testator, to *B*.; it was held that *B*, who survived the testator, was entitled, notwithstanding he died in the lifetime of *A*. (*u*).

In *Collier* v. *Collier*, 3 Ves. 33, a testator gave to his wife a sum, in addition to what was secured to her by settlement, in consideration of the care and expense she would incur in the maintenance of their children; and it was held the wife was bound to maintain, though not to educate, the testator's children, out of this additional fund. Again, where a testator disposed of trinkets to his widow for life, with a power to her to give the same to one or more of his, the testator's, grandchildren; and the widow, instead of disposing of them, left them, as her husband should dispose of the same, by will; the court held that all the grandchildren were entitled equally, notwithstanding the widow had disposed of some of these trinkets to the grandchildren (*x*). A bequest to a son, accom-

(*u*) *Medlicot* v. *Bowes*, 1 Ves. S. 208.

(*x*) *Wilts* v. *Boddington*, 3 Bro. C. C. 95.

panied by a desire, that the son should do a particular act for the benefit of his sisters, amounts to an obligation on the son, so far as the value of the father's estate extends (*y*). So the verbal desire of a testator, coupled with a *promise of his executor* to perform such desire, and which promise was reduced into writing, and in consequence of which promise the testator did not alter his will, was held to bind the executor as a trustee, in a court of equity, notwithstanding the testator stated, that "he left it to the generosity of the executor to perform his desire (*z*)." Indeed, wherever a bequest is given to a person for a particular specified purpose, such person shall be held a trustee, as the means of effectuating the testator's intention (*a*). The appointing a debtor an executor, though it is at law a release of the debt, because an executor cannot sue himself; yet in equity the debt subsists, and the executor shall be considered a trustee of such debt, for the benefit of the testator's creditors, legatees, or next of kin (*b*).

(*y*) *Blount* v. *Doughty*, 3 Atk. 484.

(*z*) *Burrow* v. *Greenough*, 3 Ves. 154.

(*a*) *Moggridge* v. *Thackwell*, 1 Ves. 475.

(*b*) *Carey* v. *Goodwyn*, 3 Bro. C. C. 111; *Pulteney* v. *Darlington*, 1 Bro. C. C. 227.

is observable, that though executors or ees may be bound by trusts, yet the legal rs of stock are entitled to a transfer; and Bank of England cannot mix itself up with trusts, or interfere in the execution there-). In the event of a trust failing, the ıtor shall, as to the personal estate, be a ee for the next of kin (*d*). Again, though quest, charged with an annuity, lapse, he residuary legatee, or executor, or next n, or whoever is entitled to the surplus, be held a trustee for the annuitant. A tion to executors to discharge debts, mean- those, as the testator expressed his will, my own contracting," and subsequently, estator bequeathed the residue of his per- l estate to his mother: "she paying my just s exactly:" it was held the mother should e liable to pay mortgage debts contracted e testator's ancestors (*e*). And here it may emarked, that leaseholds renewed by a nt for life, are subject to the same trusts as

*Hartgu* v. *Bank of Eng-* 3 Ves. 58; *Bank of Eng-* *Parsons*, 5 Ves. 669.

*Morice* v. *Bishop of* m, 9 Ves. 399; S. C. s. 522; *Paice* v. *Arch-* *of Canterbury*, 14 Ves. 370; *James* v. *Allen*, 3 Meriv. 17; *Oke* v. *Heath*, 1 Ves. S. 142.

(*e*) *Leman* v. *Newnham*, 1 Ves. S. 52; *Hudson* v. *Lawn*, 1 Bro. C. C. 58; *Ancaster* v. *Mayer*, 1 Bro. C. C. 453.

the lease surrendered (*f*): and if the interest of a tenant for life, in the right of renewal, be sold, the money arising from the sale must be settled on the like trusts, to which the old leaseholds were subject (*g*).

Where a testator, however, merely empowers a person to do a particular act, it does not amount to a trust: and unless the power be exercised, the object of the power cannot derive any benefit from it (*h*). Thus where a bequest is to one, giving an absolute power over the property, it cannot be made subject to a trust, to arise by the construction of a court of equity: and where a bequest is of what *A.* shall *leave* (*i*); or of all that he has not any use for: or where a discretion is given to trustees, though for other purposes in the will they are appointed executors in trust, the court cannot expound (*k*) that which is discretional to be absolute (*l*). "Indeed," said Lord Loughborough,

(*f*) *Rawe* v. *Chichester*, Ambl. 715; *James* v. *Dean*, 11 Ves. 383; S. P. 16 Ves. 200.

(*g*) *Owen* v. *Williams*, Ambl. 734.

(*h*) *Bull* v. *Vardy*, 1 Ves. J. 271; *Oke* v. *Heath*, 1 Ves. S. 141.

(*i*) *Spange* v. *Barnard*, 2 Bro. C. C. 585; *Malin* v. *Keightley*, 2 Ves. J. 531; *Pushman* v. *Filliter*, 3 Ves. 9; overruling *Upwell* v. *Halsey*, 1 P. W. 651.

(*k*) *Gibbs* v. *Rumsey*, 2 Ves. & B. 294.

(*l*) *Pink* v. *De Thusey*, 2 Madd. 161.

"if a person, to whom a recommendation is given to dispose of property in a particular channel, has at the same time, either in express terms, or by implication, the power of spending part; or if the nature of the subject implies it, however strong the bequest is, you cannot hold it an absolute trust; for that is making a will for another man: the concurring course of authorities is, that where there is a gift of the absolute ownership, a devise over in whatever terms conceived (if general, and not circumscribed) is void (*m*):" and in this way Lord Loughborough reconciled the decision in *Cunliffe* v. *Cunliffe*, Ambl. 686, &c. which gave a power over the fee, and *Malin* v. *Keightley*, 2 Ves. J. 531.

It may be further remarked, that a reference to plate, in an exception, as being hereinafter bequeathed to my daughter, and not afterwards mentioned, will not amount to a bequest to the daughter (*n*), so as to bind an executor or residuary legatee. So a bequest to executors of 50*l.* each, the testator stating that "they will be benefited hereafter when the stock comes to

(*m*) *Malin* v. *Keightley*, 2 Ves. J. 531; *Spange* v. *Barnard*, 2 Bro. C. C. 585.

(*n*) *Frederick* v. *Hall*, 1 Ves. 397; Viner's Abr. Devise, [D. b.] pl. 8; *Upton* v. *Lord Ferrers*, 5 Ves. 805.

be transferred after the death of *A*," without any bequest specifically of such stock to the executors, will not be sufficient to entitle the executors to the residue (*o*). It is admitted, in this case, however, that the recital of a gift, though nothing be in fact given, will amount to a gift, if there be nothing else in the will, to which the recital can refer (*p*).

## *Of Partial Interests.*

BEQUESTS may be confined to partial interests by express words, as to one explicitly for years or for life (*a*): and here it is observable, that an absolute interest may, on the happening of a particular event, or the neglect to comply with certain conditions, be abridged to a life, or other partial interest (*b*); provided the event on which such alteration of the interest is to take place, must happen, if at all, within the rules of law, prescribed against perpetuities (*c*). Bequests which apparently pass the absolute interest, may, by construction, and to give

(*o*) *Constantine* v. *Constantine*, 6 Ves. 103.

(*p*) *Smith* v. *Fitzgerald*, 3 Ves. & B. 8.

(*a*) *Bradley* v. *Westcote*, 13 Ves. 451.

(*b*) *Campion* v. *Pickax*, 1 Atk. 472.

(*c*) *Robinson* v. *Creaton*, 15 Ves. 526.

to the testator's intention, be confined to interest only (*d*); provided such intent carried into effect consistently with the rules and equity (*e*), as by construing *heirs* or *children* (*f*). And where a bequest of a was to *A.* for life, and in case of her se, to and for the use of *A.*'s children, and share alike; and by a codicil, a valuring was given to *A.* absolutely, it was held *A.* was, by construction, only entitled to terest for life (*g*): from the inconsistency ing a ring by a codicil, which would have d as part of the residue, if the residue had intended to pass to *A.* absolutely; sed , if, at this day, the construction would e confined to the death of *A.* in the life of the testator (*h*)? A bequest, though , for a particular purpose, as to provide tenance for children, may confer a life

*Garden* v. *Pulteney*, 2 23; S. C. Ambl. 449; v. *Melligan*, 1 Bro. C.

*Britton* v. *Twining*, 3 176; *Elton* v. *Eason*, 78; *Crone* v. *Odell*, 1 B. 479; confirmed 3 P. C. 73; overruling v. *Vansittart*, Ambl. 560; *Jacob* v. *Amyatt*, 4 Bro. C. C. 542.

(*f*) *Crawford* v. *Trotter*, 4 Madd. 362.

(*g*) *Lord Douglas* v. *Chalmer*, 2 Ves. J. 507.

(*h*) *Hinckley* v. *Simmons*, 4 Ves. 160; *Cambridge* v. *Rous*, 8 Ves. 12.

interest (*i*), notwithstanding one of the chief objects of the testator fails (*k*), viz. the legatee's not having any child. In *ex parte Davies*, 6 Ves. 149, a bequest was made to a wife for a specified time, and for the purpose of providing maintenance for the testator's son during his minority, with an appointment of guardians in the event of the wife's death during such minority, and it was held the interest of the widow determined by her death. An interest for life may arise by implication, as in a bequest of a term to one, after the death of *A*, who had no interest before; here *A*. will be entitled for life by implication (*l*): or by a bequest to one for life, with a direction after her death that the remainder, which the testator died possessed of, might be equally divided between his two daughters, to be by them divided among the children of their respective bodies; in which case it was held each of the daughters should take a life estate in moieties (*m*). Things passing as appurtenant with that which is limited for life, will likewise be confined to the same dura-

(*i*) *Brown* v. *Casamajor*, 4 Ves. 498.

(*k*) *Hammond* v. *Neame*, 1 Swanst. 38.

(*l*) *Roe* v. *Summerset*, Burr. 2609; Swinb. 357, n.

(*m*) *Ramsden* v. *Hassard*, 3 Brown, 236; *ex parte Rogers*, 2 Madd. 449.

ion as the bequest of the principal (*n*). Thus, where a bequest was of a house to one for life, with all the household goods therein at the time of the testator's decease; it was held that the word "with" so connected the bequest of the goods and house, that the legatee was decreed to have only a life interest in the goods (*o*). And where a testator, reciting that his daughter was very ill, said, "if she die, I leave to my wife the revenue and dividends of what little estate I have, but if my daughter lives, my wife to enjoy her dower only:" the daughter survived the testator, but died of the same illness, and it was held, the widow was entitled for her life only (*p*). And where a bequest was to *A.* of an annuity, during the life of the testator's executor, on *A.*'s death, his executor was decreed to be entitled as a *quasi* occupant, during the life of the executor of the testator (*q*).

It is here observable, that a *bonus* accruing to the principal of a sum, under a general bequest of the fund, as distinguished from a particular part of it, and limited to one for life,

(*n*) *Richard* v. *Baker*, 2 Atk. 323.

(*o*) *Leeke* v. *Bennett*, 1 Atk. 470.

(*p*) *Duhamel* v. *Ardovin*, 2 Ves. 164.

(*q*) *Savery* v. *Dyer*, Ambl. 139.

with limitations over, must be considered to form part of the fund, and be subject to the trusts of the *corpus* (*r*): and the tenant for life will be entitled to the interest only, to be derived from such accumulation or accression; the Bank, however, has the power of giving the *bonus* to the tenant for life (*s*). A life estate may also arise to a legatee by a direction to distribute, by will, the capital of the legacy to the children of the legatee, at his death (*t*); or by a direction to trustees to pay the interest of a legacy to *A.* during life (*u*); or by reference to a prior bequest for life, in the same will (*x*); or by a direction to deliver an inventory (*y*); or by a direction to trustees to divide the principal amongst heirs equally, after the death of the parent (*z*); and even though to such life estate there may be added a power of limited disposition (*a*): and a life interest may be give

(*r*) *Norris* v. *Harris*, 2 Madd. Rep. 279; *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. S. 76; *Paris* v. *Paris*, 10 Ves. 185; Ib. 289; *Browne* v. *Grombridge*, 4 Madd. 495.

(*s*) *Barclay* v. *Wainwright*, 14 Ves. 66.

(*t*) *Ramsden* v. *Hassard*, 3 Bro. C. C. 236.

(*u*) *Jacobbs* v. *Amyatt*, 4 Bro. C. C. 542; S. C. cited 1 Mad. 376, n.

(*x*) *Longden* v. *Simson*, 2 Ves. 295.

(*y*) *Southey* v. *Lord Somerville*, 13 Ves. 486.

(*z*) *Jacobbs* v. *Amyatt*, 4 Bro. C. C. 542.

(*a*) *Bradley* v. *Westcote*, 13 Ves. 445.

ith a power to trustees to advance any sum or maintenance (*b*); or an absolute interest ay be limited, defeasible at the discretion of ersons in existence (*c*). Where a testator irected his executor to permit *A.* to enjoy the ouse in which the testator lived at *L.* for a ear, after his decease, provided she continued o live in *L.*; with a further direction to the xecutor to pay one guinea a week to *A*, during er stay in *L*, for and towards household exenses: *A.* resided in *L.* after the expiration f the year, and claimed the continuance of er weekly stipend, but it was decided that the equest determined, at the end of the twelve onths (*d*). Where, however, a direction was iven to trustees, out of the rents and profits of and, to raise and pay 100*l.* to *A*, and *B.* his fe, during their respective lives; viz. 60*l.*, part hereof, to be paid to *B*, for the better support f herself and her daughter, the remaining 40*l.* o *A.*; *A.* dying in the testator's lifetime, it as held that *B.* was entitled to the 100*l.* during er life (*e*). Bequests in remainder are accelerated by the death of those persons intended to

(*b*) *Robinson* v. *Creator*, 15 Ves. 526.

(*c*) *Keates* v. *Burton*, 14 Ves. 434.

(*d*) *Walker* v. *Watts*, 3 Ves. 133.

(*e*) *Cowper* v. *Scott*, 3 P.W. 121.

take for life, notwithstanding their death in the testator's lifetime (*f*).

## CHAP. VIII.

### *Of Legacies defeasible, by Executory Bequests.*

FORMERLY a bequest of chattels to one for life, with remainder over, was held void as to the remainder, because a life interest was considered to consume the whole benefit of chattels: but notwithstanding this idea, the difficulty was supposed to be surmounted by a bequest, of the use of the same thing, to one for life, with remainder over (*a*). Such a limitation is now clearly good by way of executory bequest (*b*); though if the articles be in their nature consumable in the very use, then it is said the old rule must still prevail (*c*); unless the bequest be residuary, when the value is decreed to be

(*f*) *Whitmore* v. *Trelawny*, 6 Ves. 133; S. P. 1 Mad. Rep. 290.

(*a*) *Manning's Case*, 8 Co. Rep. 95; *Lampet's Case*, 10 Co. Rep. 47; *Hyde* v. *Parrat*, 1 P. W. 5; *Tisson* v. *Tisson*, 1 P. W. 503; Swinb. 856, *et seq.*

(*b*) *Wind* v. *Jekyl*, 1 P. W. 573.

(*c*) *Randall* v. *Russell*, 3 Meriv. 195.

ascertained by sale, and the produce applied, for the benefit of the tenant for life (*d*). Even though the absolute interest in a chattel, or in personal property, be disposed of, yet the same interest may be defeated by an executory bequest over; provided the bequest over be limited so as necessarily to take place, if at all, within a life or lives in being, and twenty-one years afterwards (*e*), and the two periods of gestation (*f*); viz. the period before the birth of a child, one of the lives, in ventre sa mere; and the period of the birth of another child, after the decease of the surviving life, and within the second period of gestation, after the expiration of the twenty-one years; and this period of time is fixed in analogy to the rules of law relating to real estate, which cannot be rendered unalienable for a longer period (*g*). A bequest therefore to *B*, after the failure of the issue of *A*, is void, because such a limitation transgresses the period mentioned; since *A. may* have issue that, by *possibility*, may exist, beyond the lives of persons in being and twenty-one

(*d*) *Randall* v. *Russell*, supra; *Fearnes* v. *Young*, 9 Ves. 349.

(*e*) Fearne's Cont. Rem. 430, 7th edit.; *Griffiths* v. *Grieve*, 1 Jac. & Walk. 84.

(*f*) *Woodford* v. *Thellusson*, 11 Ves. 112; overruling *Love* v. *Wyndham*, 1 Mod. 50.

(*g*) Co. Litt. 20 a, n. 5.

years, and the two periods of gestation (*h*). A bequest, however, to a person *in esse* for *life*, after an indefinite failure of issue, is good; because such failure and bequest, if to happen and take place at all, must be within the period of the life of such legatee (*i*). Therefore, giving a life interest only to a person in being, though after a limitation to a person and his issue, must necessarily be intended, and point to a failure of issue, within the compass of the life of him to take in remainder; but a bequest is not good unless so circumscribed (*k*): thus the presumption arising on the last case, would be rebutted by limiting a bequest to one in being, his executors, &c., after a bequest to one and his issue (*l*). So where a limitation over is, by construction, confined to the death of persons living, it will be supported (*m*); and a limitation will be good, wherever the objects to take in remainder are to be ascertained at the

(*h*) *Nichols* v. *Hooper*, 1 P. W. 200; *Carr* v. *Erroll*, 14 Ves. 478; *vide* chap. *Absolute*.

(*i*) *Pinbury* v. *Elkin*, 1 P. W. 565; *Sheffield* v. *Lord Orrery*, 3 Atk. 288; *Howard* v. *Norfolk*, 2 Swanst. 454; *Stanley* v. *Leigh*, 2 P. W. 699; *Norfolk's Case*, 3 Cha. Cas. 30; *Southey* v. *Somerville*, 13 Ves. 487; overruling *Child* v. *Bailie*, Cro. Jac. 459.

(*k*) *Barlow* v. *Salter*, 17 Ves. 479; *Sheers* v. *Jefferys*, 7 Term Rep. 589.

(*l*) *Massey* v. *Hudson*, 2 Meriv. 130.

(*m*) *Kirkpatrick* v. *Kirkpatrick*, 13 Ves. 485; *Thrustout* v. *Denny*, 1 Wilson, 270.

death of persons who are, or shall be, living at the testator's decease, and within the above limits (*n*). Every construction is made by the courts to effectuate bequests over: thus a bequest to *A*, provided *B.* shall die without *leaving* issue, has been, in numerous cases (*o*), confined to the death of *B.* without issue living at his death; and in other cases, the limitation over has been confined to the death of the legatee, without issue, under twenty-one; according to *Perry* v. *Woods*, 3 Ves. J. 204; *Taylor* v. *Clarke*, 2 Eden, 204; *Peake* v. *Pegdin*, 2 Term Rep. 720; *Sheffield* v. *Lord Orrery*, 3 Atk. 228; *Mendes* v. *Mendes*, 1 Ves. 91: and by this construction, the bequests have been rendered good. A limitation, it is observable, may be good in one event, though too remote in another event (*p*). Again, wherever the word *issue* clearly points to, and means *children* living, or to be born during the life of the testator, so as to be living at his decease, the bequest over will be supported; as

(*n*) *Ling* v. *Blackall*, 7 Term Rep. 100; *Lyon* v. *Mitchell*, 1 Madd. 467; *Woodford* v. *Thellusson*, 11 Ves. 112.

(*o*) *Forth* v. *Chapman*, 1 P. W. 663; *Pinbury* v. *Elkin*, 1 P. W. 563; *Crooke* v. *De Vandes*, 9 Ves. 204; *Keeley* v. *Fowler*, 6 Bro. P. C. 309.

(*p*) *Stanley* v. *Leigh*, 2 P. W. 686; *Phipps* v. *Mulgrave*, 3 Ves. J. 613; *Keiley* v. *Fowler*, 6 Bro. P. C. 315; *Trotter* v. *Oswald*, 1 Cox, 317.

where a bequest was to the children of *A.* absolutely, but if *A.* shall die without issue, then a limitation over to others of the legacies, which were given to her children (*r*); it was held the legacies given over were good, because the period either of vesting in children, or of the ulterior limitation, must take effect on the death of *A.* Again, where a bequest was, after the death of a tenant, for so many years of a term as he should live, with a remainder to all and every the child and children of such tenant for life, &c. but if it should happen that the tenant for life should die without issue, in the lifetime of persons in being, then the bequest was given over; the limitation was held good (*s*), because the event must happen, if at all, during the life or lives of a person or persons in being. And where the parent takes an express estate for life, and no longer, with a power of appointment to his children, and limitation over if he shall die without issue; from the intention, the limitation has been held to be confined to issue living at the death of the tenant for life, and construed as if the limitation had been, "and if he shall die

(*r*) *Salkeld* v. *Vernon*, 1 Eden, 65.

(*s*) *Attorney-General* v. *Bayley*, 2 Bro. C. C. 553.

without children;" and therefore supported (*t*). So issue has been construed to mean children, as before mentioned in other cases (*u*). And *heirs of the body* have been considered words of purchase, by reason of the intention, disclosed from the addition of the words, executors, administrators, and assigns (*x*). Where a bequest was to *A*, &c. (*y*), and if she marry without the consent of my executors, or should die without issue, then all, &c. to return to my executors, to be by them distributed, &c. (which is an extremely strong case in favour of supporting the limitation over, since the executor of the surviving executor does in fact represent, and is considered, the executor of the original testator), the court supported the bequest over; *A*, who married with the requisite consent, having afterwards died without having had any issue, and the will was construed to take effect on the death of *A*, without issue living at that time. On a bequest to one for life, with a limitation over to her children, but if all her

(*t*) *Hockley* v. *Mowbrey*, 3 Bro. C. C. 84; 1 Ves. J. 49; *Hughes* v. *Sayer*, 1 P. W. 534.

(*u*) *Le Farrant* v. *Spencer*, 1 Ves. 98; *Maddon* v. *Staines*, 2 P. W. 422; *Lampley* v. *Blotter*, 3 Atk. 396; *Crooke* v. *De Vandes*, 9 Ves. 197.

(*x*) *Hodsel* v. *Bussell*, cited 2 Ves. S. 660.

(*y*) *Keily* v. *Fowler*, 6 Bro. P. C. 309.

children shall die under *twenty-seven*, then over: the ulterior limitation is void (*z*), because such event *may* not happen within the prescribed limits; and the same rule will apply though the excess be of a day (*a a*).

## *Trusts for Accumulation.*

THE same rule which is now applicable to executory bequests, was formerly the rule respecting trusts for accumulating the rents and profits of land, or the interest of money, or produce of other personal estate. This doctrine, however, was attended with so much inconvenience to families, and so contrary to the policy of a commercial country, that in consequence of the will of Mr. Thellusson (*a*), the law was in this respect altered, by the stat. 39th and 40th Geo. III. c. 98, intituled, "An Act to restrain all trusts and directions in deeds and wills, whereby the profits or produce of real or personal estate shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited." By this act, a per-

(*z*) *Cambridge* v. *Rous*, 8 Ves. 24.

(*a a*) *Audley* v. *Gee*, 1 Cox, Rep. 224; *Robinson* v. *Leake*, 2 Meriv. 362.

(*a*) Vide *Woodford* v. *Thellusson*, 11 Ves. 112.

son cannot, by will, either wholly or partially, effectually direct an accumulation, either of real or personal estate, beyond twenty-one years after his death, or during the minority of persons living, or en ventre sa mere at the death of such devisor or testator. But this act does not extend to trusts for,

1st, Payment of debts of any person or persons:

2d, Nor to raising portions, for any child or children of the devisor or testator, or for any child or children of any person taking any interest under a will or testament:

3d, Nor to any direction, touching the produce of timber or wood, on any lands or tenements; but such directions and provisions may be made, in the same manner as if the act had not passed. This act does not extend to heritable property in Scotland, nor to any will made before the passing of the act, unless the testator had been living, and of sound mind, after the expiration of twelve calendar months, from the passing the same act.

All trusts, therefore, which before passing this act were void, as being too remote, are now void notwithstanding the act; but all limitations which would have been good before that act, are now supported as far as the same are good

something tantamount to a transfer (*k*). The delivery of the key, of the place wherein bulky goods are placed, has been held a sufficient delivery of possession; because it is said to be the way to come to the possession, or to make use of the thing, and therefore the key is not considered as a symbol, but is held to amount to an actual delivery (*l*). A general bequest of all a man's personal estate, or of a residue of such personalty, cannot be good, as a donatio mortis causâ, without some proof of delivery; because without such proof, the bequest would, in effect, be made by a nuncupative will (*m*). So strict were the Civilians in regard to these bequests, donatio mortis causâ, that they required five witnesses to attest them (*n*). Where a person, on his death-bed, drew a bill on a goldsmith, to pay 100*l.* to his wife to buy her mourning, as appeared by an indorsement on the bill, it was supported as a good gift of this description (*o*); though the same gift was said not to be a donatio causâ mortis, strictly so called, but an appointment of so much money

(*k*) *Ward* v. *Turner*, 2 Ves. J. 442.

(*l*) *Ward* v. *Turner*, 2 Ves. J. 444.

(*m*) *Ward* v. *Turner*, 2 Ves. J. 435.

(*n*) *Ibid.*

(*o*) *Lawson* v. *Lawson*, 1 P. W. 443.

debts (*c*); but a bequest of this nature need not be proved with the testator's will (*d*): nor does such bequest require the consent of executors to its validity, being a gift *inter vivos*, to be perfected *post mortem*. To the validity of this bequest an actual delivery is necessary (*e*); therefore a bequest of a carriage and horses, while the testator was on his death-bed, was held insufficient, being incapable of delivery (*f*). And the delivery of a trunk has been held insufficient to pass a tally for money contained in the trunk, without express mention of such tally, in the delivery of the trunk (*g*). A symbolical delivery is not deemed sufficient to support such a bequest (*h*); thus, where a testator delivered the receipts for stock, though his intention was clear to pass such stock, yet it was not held a sufficient delivery (*i*); because stock is only to be delivered by a transfer, or

(*c*) *Tate* v. *Hibbert*, 4 Bro. C. C. 293; S. C. 2 Ves. J. 115; Swinb. 54; *Walter* v. *Hodge*, 2 Swanst. 97; *Ward* v. *Turner*, 2 Ves. 438.

(*d*) *Lawson* v. *Lawson*, 1 P. W. 442.

(*e*) *Ward* v. *Turner*, 2 Ves. J. 439, 442; *Hill* v. *Chapman*, 2 Bro. C. C. 602.

(*f*) *Miller* v. *Miller*, 3 P. W. 358; *Ward* v. *Turner*, 2 Ves. J. 442.

(*g*) *Jones* v. *Selby*, Prec. in Chan. 302.

(*h*) *Ward* v. *Turner*, 2 Ves. J. 431; 2 Atk. 214; Swinb. 58, n.

(*i*) *Ward* v. *Turner*, 2 Ves. J. 442.

Changing the place of the deeds, however, by the direction of the testator, has not been considered a sufficient delivery, to effectuate a bequest of this sort to a testator's daughter (z). It has been said, that all gifts of this description, to be valid, must be free and unfettered by any condition (a); but this doctrine seems inconsistent with later cases (b).

(z) *Bryson* v. *Browning*, 9 Ves. 1.

(a) *Bibby* v. *Coulter*, cited in *Snelgrove* v. *Bayley*, Cas. T. Hard. 206, n.

(b) *Blount* v. *Burrow*, 4 Bro. C. C. 72.

# PART II.

## CHAP. I.

### *f General and Specific Bequests; and what will pass under Particular Denominations, or General, or Specific Terms.*

T has been before observed, that in general bequests, even under particular denominaons, every thing of which the testator is ssessed at his decease, and answering the scription, will pass; thus, a bequest of all my rsonal estate, will pass personal estate, of at kind soever, belonging to the testator at s death (*a*). So that even the will of a joint-ant, who while such may dispose of the rsonal estate he holds in severalty, or in mmon, will pass the personal property he may

*a*) *Dean and Chapter of istchurch* v. *Burr*, Ambl. 689; *Masters* v. *Masters*, 1 P. W. 425.
; *Sager* v. *Sager*, 2 Ves.

acquire by survivorship subsequent to the date of his will. Specific bequests, on the contrary, are such as are possessed by the testator at the date of his will, and have reference to a fund or chattel, existing at the date of the will, and which must exist and be possessed by the testator, at his decease, to render such a bequest effectual.

It will now be shown what things have been held to pass under particular descriptions:

*"All I am possessed of."*

Under a bequest of "all I am possessed of," all the testator's personalty at the time of his death will pass; but such a bequest may, from the context of the will, be confined to all the property the testator was possessed of, in a specific fund (*b*).

*"All in a house."*

Under a bequest of "all that shall be in my house," cash and bank notes in the house will pass; but bonds and other securities for money will not pass (*c*): these choses en action not having any locality; and this construction is not altered by an exception of a particular chose en action (*d*); though the same general expression

(*b*) *Wilde* v. *Holtzmeyer*, 5 Ves. 816.

(*c*) *Popham* v. *Lady Aylesbury*, Ambl. 69; *Moore* v. *Moore*, 1 Bro. C. C. 127.

(*d*) *Vaughan* v. *Brook*, 1 Sch. & Lef. 319.

may, as before observed, by context, be restricted to the fund and bequest immediately preceding (*e*). Under a bequest of "all my property, (except choses en action) at *A.*" bonds will not pass, because they have not any locality (*f*). Where a bequest was of "all things not hereinbefore bequeathed," it was held this general expression should be confined to things of the same kind, as those before specified in the will; especially, it was said, as the testator was a sailor, who might be presumed ignorant of property which had devolved to him (*ff*). A testator being possessed of 200 *l.* per annum in Bank Long Annuities, gave to his daughter 100 *l.* a year, Long Annuities, and proceeded thus: "Item, I give to *A.* 50 *l.* Long Annuities:" Item, I give to *B.* 50 *l.* Long Annuities; and it was held, from the context, and construction of the word item, that *A.* and *B.* were entitled to yearly annuities (*g*). And where a bequest was of "200 *l.* per annum, part of the money I now have in Bank securities,

*"All my property."*

*"All things not before bequeathed."*

*"Annuity."*

(*e*) *Wilde* v. *Holtzmeyer*, 5 Ves. 811.

(*f*) *Fleming* v. *Brook*, 1 Sch. & Lef. 318.

(*ff*) *Cook* v. *Oakley*, 1 P. W. 302; *Duhamel* v. *Ardovin*, 2 Ves. 163.

(*g*) *Horton* v. *Stafford*, 1 Bro. C. C. 482; *Luke* v. *Bennett*, 1 Atk. 471.

to *A*, for her own use and disposal (*h*);" it was held that *A*. was entitled to so much principal stock, as would produce 200 *l*. a year. Where a testator bequeathed a specific sum of stock, in Long Annuities, on the state of the testator's property, it was decreed to be the specified sum in capital, and not in interest, or annually (*i*): though under a general bequest of 100 *l*. Long Annuities stock, a legatee would be entitled to a Long Annuity of that yearly value (*k*). Where a bequest was "of 200 *l*. per annum, for the use of *A*. and her children, which annuity is to be paid out of my general effects, till it is convenient to my executors to invest 5,000 *l*. in the funds, in lieu thereof, for her and their use, and to the longest liver of her and her children, subject to an equal division of the interest while more than one of them shall be alive;" it was held that the 5,000 *l*. was merely to be an appropriation, and not a substitution for the annuity (*l*). Under a bequest of an annuity to a wife, made by a will

(*h*) *Innes* v. *Mitchell*, 6 Ves. 464; S. C. 9 Ves. 212, affirmed; S. P. *Attorney-General* v. *Grote*, 3 Meriv. 319.

(*i*) *Fonereau* v. *Poyntz*, 1 Bro. C. C. 471; *Rawling* v. *Jennings*, 13 Ves. 39.

(*k*) *Attorney-General* v. *Grote*, 3 Meriv. 319.

(*l*) *Innes* v. *Mitchell*, 6 Ves. 466; S. C. affirmed 9 Ves. 212.

in England, charging the same annuity on Irish property, the wife was held to be entitled to an annuity payable in England, and in English currency, and without any abatement for remittance (*m*) : but legacies are generally payable in the currency of that country in which the will is made, unless the testator makes a separate distribution of his several properties (*n*). Where a bequest was of an annuity of 50 *l.* " to be purchased by my executors, and until purchased the legatee to have 40 *l.* a year ;" the legatee was held to be entitled to 40 *l.* the first year, and afterwards to be entitled to have an annuity purchased for him of 50 *l.* (*o*). It may be observed, that under a bequest of an annuity charged on a term during the continuance of the term, on renewal of the term the annuity will be a subsisting charge (*p*). Under a bequest of " arrears of rent and interest," arrears of an annuity also will pass (*q*) ; but a bond to secure arrears of rent will not pass (*r*) ; nor will

*" Arrears of rent."*

(*m*) *Wallis* v. *Brightwell*, 2 P. W. 88.

(*n*) *Pierson* v. *Garnet*, 2 Bro. C. C. 45; *Malcolm* v. *Martin*, 3 Bro. C. C. 52.

(*o*) *Browne* v. *Spooner*, 1 Ves. J. 291.

(*p*) *James* v. *Dean*, 11 Ves. 383; *Winslow* v. *Tighe*, 1 Ball & B. 206; *Randall* v. *Russell*, 3 Meriv. 196.

(*q*) *Hele* v. *Gilbert*, 2 Ves. 430.

(*r*) *Jones* v. *Lord Sefton*, 4 Ves. 166.

a bequest of arrears of interest pass the principal due on mortgage (*s*); and a gift of arrears now "due," will pass arrears due only, at the date of the will, and of which demand had been made (*t*). Under a bequest "of the balance of sums of money in the hands of *A.*" a sum directed by the testator to be transferred by *A*, and which was accordingly done, but not before the testator, who was abroad, died, was held to pass; the authority being revoked by the testator's death, before the transfer took place (*u*). Under a bequest of "a cabinet of curiosities," ornaments of the person, though the same were usually shown with the articles in the cabinet, and occasionally worn, will not pass (*x*). "Chattels of what kind or nature," are terms sufficiently large for the purpose of passing a residue (*y*). Under a bequest of "clothes and linen whatsoever," body linen only, and not table or bed linen, were held to pass (*z*). Under a bequest of "corn, now in my barn," if that corn be spent, and new corn

*"Arrears now due."*

*"Balance."*

*"Cabinet of curiosities."*

*"Chattels of what kind or nature."*

*"Clothes and linen."*

*"Corn, now in my barn."*

(*s*) *Hamilton* v. *Loyd*, 2 Ves. 416.

(*t*) *Attorney-General* v. *Bury*, 1 Equity C. Ab. 201, pl. 2.

(*u*) *Hill* v. *Mason*, 2 Jac. & Walk. 248.

(*x*) *Cavendish* v. *Cavendish*, 1 Bro. C. C. 468.

(*y*) Swinb. 928, 932, edit. 7th; Co. Litt. 118 b.

(*z*) *Brookshank* v. *Wentworth*, 3 Atk. 63; *Hunt* v. *Hunt*, 3 Bro. C. C. 311.

put in, yet it will not pass (*a*). Under a bequest of "one-third of what shall be due to me at my death," the legatee was held entitled to one-third only, after the testator's debts were paid; though the residue was bequeathed subject to the testator's debts and other legacies (*b*). Under a bequest of "all debts" to a debtor, those debts due at the date of the will only, will be released or discharged, and not debts contracted subsequent to the testator's will, unless the will be republished (*c*): but under a bequest of a debt described as "250 *l.* due from *A*, on bond (*d*)," while the same was partly on bond, partly by covenant, and partly in the character of executor, yet it was held the amount of the debt passed. Judgments have been held to pass as debts, from the context (*e*): so money at a bankers has been included in such a bequest (*f*). And a bond given for securing the retransfer of stock, has been held to pass under the description of "all debts" (*g*): but under a bequest

*"One-third of what shall be due to me."*

*"All debts."*

*"Debts on bond."*

(*a*) *All Souls' College* v. *Codrington*, 1 P. W. 598.

(*b*) *Reed* v. *Addison*, 4 Ves. 575; *Campbell* v. *Joy*, 1 Sch. & Lef. 339.

(*c*) *Smallman* v. *Goolden*, 1 Cox, 329.

(*d*) *Williams* v. *Williams*, 2 Bro. C. C. 88.

(*e*) *Stonehouse* v. *Mitchell*, 11 Ves. 352.

(*f*) *Carr* v. *Carr*, 1 Meriv. 541, n.

(*g*) *Essington* v. *Vastion*, 1 Meriv. 434.

*"Debt due on a certain day."*

of a debt, which shall be "due from *A.* to me on a specified day," the debt must be taken by the legatee as it stood on that day; and the legacy will not be altered by consignments made previous to the day mentioned (*h*). Under a bequest of "my farm," a leasehold farm will pass, if so intended (*i*). Under a bequest of "furniture," books and wine do not pass (*k*); but china will pass, unless the same constituted part of the testator's stock in trade (*l*); pictures (*m*), and plate (*n*), will also pass under this term; though under a bequest of "fixtures and furniture at *B. C.* and *D.*," the testator removing the plate when he changed his abode (*o*), it was held the plate did not pass, though this case arose on a settlement (*p*). Under a bequest of "household furniture, linen, plate, and apparel whatsoever," those descriptions of articles only of domestic use, were held to pass (*q*). Under a bequest of "household furniture," was

*"Farm."*

*"Furniture."*

*"Fixtures and furniture at B. &c."*

*"Household furniture, linen, &c."*

(*h*) *Innes* v. *Mitchell*, 6 Ves. 463.

(*i*) *Lane* v. *Stanhope*, 6 Term Rep. 345; 2 P. W. 459.

(*k*) *Bridgman* v. *Dove*, 3 Atk. 202; *Knight* v. *Powlet*, Ambl. 605.

(*l*) *Hele* v. *Gilbert*, 2 Ves. 430; *Nichols* v. *Osborn*, 2 P. W. 420.

(*m*) *Brown* v. *Cornforth*, 2 Ves. 279.

(*n*) *Kelly* v. *Powlett*, Ambl. 605.

(*o*) *Earl Albemarle* v. *Rogers*, 2 Ves. J. 481, n.

(*p*) *Pratt* v. *Jackson*, 2 P. W. 420.

(*q*) *Le Farrant* v. *Spence*, 1 Ves. 98; Dick. 359.

held to mean pictures, plate, linen, and china in the house, if suitable to the rank of the testator (*r*); though such a bequest does not extend to wine; or books (*s*). Under a bequest of "furniture, &c. with every thing," the latter words were confined to things of the same kind (*t*). A bequest of "all goods," is sufficiently comprehensive to pass a general residue (*u*); the same being as comprehensive a bequest of personal property, as a devise of all the estate is of land (*x*); and under such a bequest bonds may, of course, be included, unless restricted to a particular place, in which case bonds will not pass, because they do not admit of locality; though a similar bequest may, by construction, be confined to goods *ejusdem generis* (*y*). Under a bequest of "goods in my custody," securities for money were held not to be included (*z*). Under a bequest of "all goods, wearing apparel, of what kind and nature soever, (except a gold watch,)" were

*"Furnitu and every thing else*

*"All goods."*

*"Goods possession*

*"Goods, wearing a parel, &c.*

(*r*) *Knight* v. *Powlet*, Ambl. 605; *Nichols* v. *Osborn*, 2 P. W. 420.

(*s*) *Porter* v. *Tournay*, 3 Ves. 311.

(*t*) *Brown* v. *Cornforth*, 2 Ves. 279; 3 Ves. 219.

(*u*) *Crichton* v. *Symes*, 3 Ath. 62; Anon. 1 P. W. 268.

(*x*) Swinb. 927, edit. 7th.

(*y*) *Chapman* v. *Hart*, 1 Ves. 273; *Stuart* v. *Marquis of Bute*, 11 Ves. 666.

(*z*) *Green* v. *Simmonds*, 1 Bro. C. C. 129, n.

held to pass wearing apparel, ornaments of the person, household goods, and furniture, but not any other part of the personal estate (*a*). And where a bequest was of "all household goods, and other goods, plate and stock, within doors and without," with a residuary bequest in favour of *A.*; other goods were confined to those of the same kind, as before mentioned, and were held not to comprise bonds and other cash, which would pass by the residuary clause (*b*). Under a bequest of "household goods (*c*)," or under "household goods, and all that belong to me at my death (*d*)," will pass plate (*e*), especially if commonly used by the family. Again, under a bequest of "household goods, cattle, corn, hay, and implements of husbandry, and stock belonging to my house, &c. held by lease," to my wife for life; it was held a malt-house, included in the lease, passed, and also the stock. Under a bequest of "goods and chattels generally," choses en action (*f*),

*"Household goods, and all that belong, &c."*

*"Household goods, cattle, corn, &c."*

*"Goods and chattels."*

(*a*) *Crichton* v. *Symes*, 3 Atk. 63.

(*b*) *Woolcomb* v. *Woolcomb*, 3 P. W. 111.

(*c*) *Jackson* v. *Pratt*, 2 P. W. 302; S. C. overruled 3 Bro. Parl. Cas. 199.

(*d*) *Masters* v. *Masters*, 1 P. W. 424.

(*e*) *Snelson* v. *Corbet*, 3 Atk. 390; *Masters* v. *Masters*, ante.

(*f*) Anon. 1 P. W. 267; *Southcot* v. *Watson*, 3 Atk. 232; Swinb. 927, *et. seq.* 7th edit.; *Ryall* v. *Rolle*, 2 Atk. 182; 3 Woodd. 504.

bank notes, (being considered as cash), and money to a small amount, and leaseholds also (*g*), will pass; but bonds, and choses en action, will not pass, under a similar bequest, restricted to a particular place, because choses en action have not any locality (*h*); nor where a similar bequest is followed by an additional description, in which case the word *goods* may be confined to goods *ejusdem generis* (*i*): and the same words may also be thus confined, where there is a residuary bequest (*k*). Such a bequest may be also more confined, as of "all goods and chattels in my house," in which case, those things only pass which shall be in the testator's house at his decease, except the same be removed on account of fire, or other urgent reason (*l*); but a removal of goods, under a similar bequest, from a ship, for purposes of duty, or in case of danger, will not render the bequest ineffectual as to the goods removed (*m*). Under a similar bequest of "goods and chattels, in and about my house and out-

*"Goods and chattels in my house."*

(*g*) *Portman* v. *Wills*, Cro. Eliz. 387.

(*h*) *Chapman* v. *Hart*, 1 Ves. S. 273; *Moore* v. *Moore*, 1 Bro. C. C. 127.

(*i*) *Timewell* v. *Perkins*, 2 Atk. 102; 1 Bro. C. C. 127.

(*k*) *Rawlins* v. *Jennings*, 13 Ves. 46.

(*l*) *Chapman* v. *Hart*, 1 Ves. 273; *Moore* v. *Moore*, 1 Bro. C. C. 128; *Heseltine* v. *Heseltine*, 3 Mad. Rep. 277.

(*m*) *Ibid.*

houses," running horses were held to pass (*n*.) Under a bequest of "household goods, and implements of household whatsoever, in or about my house," were held to pass, meat and a clock not affixed to the freehold; but pistols and guns used for shooting, and riding with, were held not to pass (*o*). Under a bequest of "ground rents," a reversionary term will pass, as well as the rent reserved (*p*). Under a bequest of "household stuff," is said to be included, all necessary household utensils appertaining to the personal comfort, or convenience of a family; such as tables, beds, &c. &c.; and plate is now held to pass, under such a bequest, if commonly used by the testator (*q*). Leaseholds will pass by the term "leaseholds," absolutely, without any words of limitation (*r*): and leaseholds will likewise pass by the word "advantages," together with all profits and renewals thereof (*s*): leaseholds will likewise pass by the words "lands and tenements," if the testator has not

*"Ground rents."*

*"Household stuff."*

*"Leaseholds."*

*"Advantages."*

*"Lands and tenements."*

(*n*) *Lady Gower* v. *Lord Gower*, Ambl. 612; S. P. 2 Eden, 201; S. P. *Barton* v. *Cook*, 5 Ves. 464.

(*o*) *Slanning* v. *Style*, 3 P. W. 335.

(*p*) *Kay* v. *Lawn*, 1 Bro. C. C. 76.

(*q*) Swinb. 485, 944; 2 Fonbl. Eq. 344; *Masters* v. *Masters*, 1 P. W. 425.

(*r*) ——— v. *Melhurst*, 1 Browne C. C. 523.

(*s*) *Carte* v. *Carte*, 3 Atk. 177.

any other lands, than those which are of leasehold tenure (*t*): and the same species of property will pass under the description of a "farm" (*u*), if it appears to be the intention of the testator to pass them under this appellation. So under a bequest of "my library of books, now in the custody of *A.* and *B*," after-purchased books, placed in the same library, were held to pass; and the word "now" was construed to refer to the situation of the library (*x*). Under a bequest of "linen and clothes of all kinds, except lace," the bequest was held to be confined to linen, being wearing apparel (*y*). Under a bequest of "medals," current coin, if curious, will pass (*z*).

"*Farm.*"

"*Library of books.*"

"*Linen and clothes, &c.*"

"*Medals.*"

Stock will pass, and be comprised under a bequest of "securities" (*a*). Under a bequest of "a house," are not included pictures, or other ornaments therein (*b*). And under a bequest of "all my money in the Bank of England," stock in the funds was held to pass, the testator never having had any cash in the

"*Securities.*"

"*House.*"

"*Money in Bank of England.*"

(*t*) *Ex parte Caswell*, 1 Atk. 560.

(*u*) *Lane* v. *Stanhope*, 6 Term Rep. 345.

(*x*) *All Souls' College* v. *Codrington*, 1 P. W. 598.

(*y*) *Hunt* v. *Hart*, 3 Bro. C. C. 311.

(*z*) *Bridgman* v. *Dove*, 3 Atk. 202.

(*a*) *Dicks* v. *Lambert*, 4 Ves. 725.

(*b*) *Beck* v. *Rebon*, 1 P. W. 95.

*Mortgage money.*

Bank (*c*). Under a bequest of money "due on mortgage," the principal only, and not the interest, will pass (*d*); though the bequest may be confined to the arrears of mortgage interest (*e*).

*Money to be laid out in land."*

A bequest of "money to be laid out in land," is, in equity, considered as land (*f*), and will even pass by a residuary clause in a will, as land (*g*); and even where a testator directed money to be raised, and the same to be invested in land, if the tenant for life of property given by the will, should be desirous and willing to have it laid out; yet, to answer the general intent of the testator, this was considered to be a devise of money, to be so invested (*h*). Where money is directed to be invested, and settled on *A*, a legatee, his heirs and assigns, *A*, was always entitled to the money (*i*), even though *A*, the legatee, were a married woman, and died without issue, before the money was

(*c*) *Porter* v. *Tournay*, 3 Ves. 312; *Gallini* v. *Noble*, 3 Meriv. 691.

(*d*) *Roberts* v. *Kuffin*, 2 Atk. 113.

(*e*) *Hamilton* v. *Loyd*, 2 Ves. J. 416.

(*f*) *Hinton* v. *Pinke*, 1 P. W. 539.

(*g*) *Rashleigh* v. *Master*, 3 Bro. C. C. 99; *Guidot* v. *Guidot*, 3 Atk. 253; *Edward* v. *Warwick*, 2 P. W. 171; *Leechmore* v. *Earl of Carlisle*, 3 P. W. 212.

(*h*) *Johnston* v. *Arnold*, 1 Ves. 171.

(*i*) *Trafford* v. *Boehm*, 3 Atk. 448; *Chaplin* v. *Horner*, 1 P. W. 484; *Edward* v. *Warwick*, 2 P. W. 175.

invested; and her husband, by administering to her, was held entitled to it (*k*); unless the wife had, in her life-time, signified her intention to have the money laid out in land; in which case her intention would have been directed to be observed, and enforced by equity, for the benefit of her heir (*l*): but between representatives, viz. the heir and the administrator, there is not any equity, but the fund must be taken as it is found (*m*).

A remote remainder-man in fee of a money fund, directed to be invested in land, may, at his election, and so far as concerns his interest, convert the land into money again, and such election would be made, by the disposition of the money so directed to be invested, as a legacy (*n*); and receiving the money as such, is an exoneration of it from the real uses: and the same money may, after such receipt or election, pass by a will, unattested, as part of the testator's personal estate (*o*). Indeed,

(*k*) *Guidot* v. *Guidot*, 3 Atk. 255.

(*l*) *Ibid.*

(*m*) *Croft* v. *Slee*, 4 Ves. 65; *Yates* v. *Compton*, 2 P. W. 310; *Crone* v. *Burley*, 3 ibid. 20; *Chaplin* v. *Horner*, *ante*; *Walker* v. *Denne*, 2 Ves. J. 176; *Wheldale* v. *Partridge*, 5 Ves. 397; *Thellusson* v. *Woodford*, 11 Ves. 112.

(*n*) *Chaplin* v. *Horner*, 1 P. W. 88; *Disher* v. *Disher*, 1 P. W. 206; *Pulteney* v. *Darlington*, 1 Bro. C. C. 222; *Ibid.* 235.

(*o*) *Ibid.* 235.

whenever the object of a will or settlement is perfected, then money, so directed to be invested, will lose its character of land, by a variation of the trust of such money, sufficient to show an intention to take the fund as money, by the person beneficially entitled to the ultimate interest (*o o*): for unless money is definitely and imperatively fixed with the character of land, it remains at the option of the persons beneficially entitled to consider it either as money or land (*p*). Formerly, when money was directed to be invested, and entailed with remainder over, an investment was directed, to give the remainder-man his chance of ultimately acquiring this property, if no recovery were suffered (*q*); unless the reversion was likewise limited (*r*) to the tenant in tail, or unless the remainder-men consented to the money being paid to the tenant in tail (*s*); in which case, the issue of such remainder-men were held to be bound (*t*); but the consent of a feme covert, being entitled in remainder, was only admitted, formerly, on a separate examination in court (*u*): if, however,

(*o o*) *Linger* v. *Sowray*, 1 P. W. 176.

(*p*) *Walker* v. *Denne*, 2 Ves. 185.

(*q*) *Trafford* v. *Boehm*, 3 Atk. 447; 2 Anstr. 453.

(*r*) *Short* v. *Wood*, 1 P. W. 471; *Benson* v. *Benson*, 1 P. W. 131; *Eyre's Case*, 3 P. W. 13, *contra*.

(*s*) *Ibid.*

(*t*) *Ibid.*

(*u*) *Ibid.*

there was an option given by the testator of purchasing either freehold estates or leasehold property, then such examination of the wife was not considered necessary, if she did any act which amounted to a declaration of her option to have the money (*x*). Now by the stat. 40th Geo. III. c. 56, money, so directed to be invested, need not be laid out in land, where it is entailed; for the courts are authorized, by that statute, to order the money to be paid to the person, who, as tenant in tail of the land, could bar the remainders over by recovery (*y*). The usual order of the court is, for payment of the money, provided the person, entitled as tenant in tail, shall be living on the second day of the ensuing term (*z*): and the same rule prevails where lands are directed to be sold, and the produce again invested; though an inquiry, in this case, is made to ascertain whether the produce is affected by any incumbrances (*a*). However, to entitle a person to receive the money, he must clearly be tenant in tail (*b*). Formerly wherever one of the legatees

(*x*) *Walker* v. *Denne*, 2 Ves. J. 170; *Wheldale* v. *Partridge*, 5 Ves. 397.

(*y*) *Ex parte Bennet*, 6 Ves. 116; *ex parte Hodges*, 6 Ves. 576.

(*z*) *Lowton* v. *Lowton*, 5 Ves. 12.

(*a*) *Ex parte Hodges*, 6 Ves. 576.

(*b*) *Ex parte Sterne*, 6 Ves. 157.

was an infant, the money was directed to be laid out by the master (*c*); but this case is also provided for by the same statute; and the infants may now, after attaining the requisite age, to bequeath personal estate, bequeath such money-land as money (*d*). Where there was a direction to trustees, out of rents and profits of land, or out of the residue of personal estate, to pay any sum of money not exceeding 300*l.* for the advancement of *A.* in business, or in his profession; part being laid out in land, it was decreed the residue should be paid in money, the court considering it a bequest of money (*e*). Wherever land is directed to be sold, and the money given to persons by name, these persons, if capable of electing, are entitled to the land, if all agree, if not, the court will direct a sale (*f*). If money is directed to be laid out in land, and settled to *A.* for life, remainder over, by a late case it has been held, *A.* shall be entitled to the interest of the money, till laid out, from the death of the testator (*g*).

(*c*) *Seeley* v. *Jags*, 1 P. W. 389; *Short* v. *Wood*, ib. 471.

(*d*) *Carr* v. *Ellison*, 2 Bro. C. C. 87.

(*e*) *Cope* v. *Wilmot*, Ambl. 703.

(*f*) *Anon.* 1 P. W. 648; *Seamer* v. *Bingham*, 3 Atk. 55.

(*g*) *Ex parte Angerstein*, before the Chancellor, Mich. Term, 1823.

Under a bequest of "moveables," will pass both goods actively and passively moveable (*h*); but debts will not, it is said, pass under this general term (*i*); though, it is said, this latter construction is altered by the addition of the word "whatsoever (*k*):" "immoveables" are held to relate to things attached to the freehold, as trees, and the like. Under a bequest of "all pictures," all pictures that shall belong to the testator at the time of his death will pass (*l*), the will speaking from the testator's death for this purpose (*m*). Under a bequest of "plate, linen, &c. in S. street, together with the lease of the same house for the term therein to come at my death," though the linen and plate, at the testator's death, were at his counting-house, yet having only one set of plate and linen, which was removed, as the testator changed his place of residence, it was held the plate, &c. passed as a general bequest (*n*). Under a bequest to a daughter of "the use of the household plate, linen, and every thing

*"Moveables."*

*"All Pictures."*

*"Plate, linen, &c*

*"Household plat linen, &*

(*h*) Swinb. 930, 933, edit. 7th.

(*i*) Swinb. 939, 7th edit.; *Sparke* v. *Denne*, Sir W. Jo. Rep. 225.

(*k*) Swinb. 940.

(*l*) *Dean of Christchurch* v. *Barron*, Ambl. 641.

(*m*) *Masters* v. *Masters*, 1 P. W. 421.

(*n*) *Land* v. *Deveynes* 4 Bro. C. C. 539; *Heseltine* v. *Heseltine*, 3 Madd. 276.

else, as the occasion shall require (*o*)," hay, corn, &c. were held to pass. A bequest of "the remainder of my effects," will pass whatever is undisposed of (*p*); unless there is a residuary bequest, when these words will be confined to effects of a like nature (*q*). Under a bequest of "profits of lands," will pass an advowson in gross, and these profits must be computed from the death of the testator (*r*). We have seen, in a preceding part of this work (*s*), who are entitled to the residue; and here it is observable, that the residue consists of whatever belongs to the testator, and remains undisposed of by him after his debts and legacies are paid (*t*); or which, being disposed of, again becomes part of the residue, either by lapse (*u*), forfeiture, or otherwise (*x*); and the same rule prevails, notwithstanding the words of the be-

*Remainder of effects."*

*Profits of lands."*

*Residue."*

(*o*) *Boon* v. *Cornforth*, 2 Ves. 279.

(*p*) *Attorney-General* v. *Caldivale*, Ambl. 635; *Mitchell* v. *Mitchell*, 5 Madd. 71.

(*q*) *Rawlins* v. *Jennings*, 13 Ves. 46; *Hotham* v. *Sutton*, 15 Ves. 319.

(*r*) *Tisson* v. *Tisson*, 1 P. W. 503.

(*s*) *Executors Trustees*, p. 129.

(*t*) *Oldham* v. *Carleton*, 2 Cox, 400; *Morgan* v. *Morgan*, 5 Madd. 412; *Burton* v. *Pierrepont*, 2 P. W. 80; *Page* v. *Leapingwell*, 18 Ves. 466; *Leake* v. *Robinson*, 2 Meriv. 393.

(*u*) *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. S. 83.

(*x*) *Oke* v. *Heath*, 1 Ves. S. 141; *Durour* v. *Motteux*, 1 Ves. 322; *Brown* v. *Higgs*, 4 Ves. 717; *Shanley* v. *Baker*, 4 Ves. 735.

quest are, "of all the residue not before disposed of (*y*)."

A specific residue, or the residue of some identified fund, though miscalculated (*z*), may pass as all the residue of the specific or identified fund; even copyholds, being according to the custom of the manor of which they were parcel, in case of intestacy (*a*), personal estate, were held to pass under a residuary clause of personalty, notwithstanding there was a general devise of freehold and copyhold lands; which latter devise was, under the circumstances of the case, held not to include the copyholds, being personalty if not devised. Leaseholds also will pass as part of the personalty, unless attendant on the inheritance, notwithstanding a general devise of lands (*b*). Again, where the bequest of a residue was to *A.* if he attained twenty-one, the interest, accruing in the mean time till *A.* attained twenty-one, will form part of the residue, and will pass as part thereof (*c*).

(*y*) *Jackson* v. *Kelly*, 2 Ves. 286.

(*z*) *Danvers* v. *Manning*, 2 Bro. C. C. 18.

(*a*) *Watkins* v. *Lea*, 6 Ves. 644.

(*b*) *Thompson* v. *Lawley*, 5 Ves. 479; 2 Bos. & Pul. 303; *Hartley* v. *Hurle*, 5 Ves. 543.

(*c*) *Trevanion* v. *Vivian*, 2 Ves. 430; *Wyndham* v. *Wyndham*, 3 Bro. C. C. 58; *Cambridge* v. *Rous*, 8 Ves. 12; *Bird* v. *Lefevre*, 15 Ves. 589, 416.

So interest arising on a general residue, before it is payable, forms, likewise, part of the residuary personal estate (*d*); but if a residue be given to one for life, with a limitation over on an event, which may never happen; until the event happen the interest will belong to the legatee, because the legacy is vested, and payable immediately, subject only to be divested on the happening of a future, and, perhaps, contingent event (*e*).

Mortgage money does (*f*), and money arising from lands may, likewise, form part of the residue of personal estate, provided the land is converted out and out into money (*g*); but unless clearly converted out and out, the heir-at-law will be entitled (*h*). The residue may, however, from the context, be confined to the residue of a specified sum, where there is a general residuary bequest (*i*): so the words

(*d*) *Heath* v. *Perry*, 3 Atk. 103, and n. 1; *Green* v. *Ekins*, 2 Atk. 573.

(*e*) *Shaw* v. *Cunliffe*, 4 Bro. C. C. 148; *Skey* v. *Barney*, 3 Meriv. 345.

(*f*) *Ex parte Sergison*, 4 Ves. 148.

(*g*) *Hewit* v. *Wright*, 1 Bro. C. C. 86; *Durour* v. *Motteux*, 1 Ves. 322; *Gibson* v. *Montfort*, 1 Ves. 490; *Ackroyd* v. *Smithson*, 1 Bro. C. C. 503; *Kennebal* v. *Abbott*, 4 Ves. 811.

(*h*) *Ackroyd* v. *Smithson*, 1 Bro. C. C. 503; *Cruse* v. *Barley*, 3 P. W. 22, and cases; *Brown* v. *Bigg*, 7 Ves. J. 282; *Maugham* v. *Mason*, 1 Ves. & B. 415.

(*i*) *Green* v. *Scott*, 1 Ves. J. 283; *Dyoss* v. *Dyoss*; cited *Page* v. *Leapingwell*, 18 Ves. 466.

"what is left," applying to the subject previously disposed of, have been confined to that subject, and not extended to the general residue (*k*): residue may also be restricted to funds in a particular place (*l*). And where there was a residuary bequest of personal estate, except such part as shall be in and about my house, a bond and cash in the house, were held not to be excepted (*ll*). But, where a bequest was "of the small remainder of my personal estate, which shall be left to my executors," it was held, from the intention, that lapsed legacies, to a considerable amount, should not pass as part of such specified residue (*m*); and this case has been lately cited and approved (*n*). And where a testator expressly excepted various articles out of the operation of his will, and of which excepted articles the testator declared, by his will, he intended to dispose by a codicil, such excepted things will not pass by the residuary bequest in such will, but the same things shall belong to the next of kin, unless disposed

(*k*) *Attorney-General* v. *Goulding*, 2 Bro. C. C. 430; *vide* 16 Ves. 451.

(*l*) *Nisbett* v. *Murray*, 5 Ves. 149; *Sadler* v. *Turner*, 8 Ves. 617.

(*ll*) *Jones* v. *Lord Sefton*, 4 Ves. 167.

(*m*) *Attorney-General* v. *Johnston*, Ambl. 577.

(*n*) *Page* v. *Leapingwell*, 18 Ves. 466; and see *Crooke* v. *Devandes*, 9 Ves. 206; S. C. 11 Ves. 330.

of by a codicil (*o*). It is observable, that the residue of a particular fund may be given, exempt from the payment of the debts of the testator (*p*). If the residue of personal estate be given to several, as tenants in common, the next of kin will be entitled to the lapsed shares of such residue, because a specific portion or part only of the residue is given to each legatee in common (*q*); if the legatees were joint-tenants, the shares of those dying would survive. Where *A*, a tenant in tail of lands of the gift of the crown, being an entail, under which the issue cannot be barred, pays off incumbrances charged on the estates so entailed, he is considered a creditor of the estate, to the amount of such payment; and such a charge, so paid off, would pass as part of the residue of the personal estate (*r*) of such tenant in tail: and the same doctrine prevails where a tenant for life pays off a charge on the real estate, of which he is tenant for life, unless he shows an intention to exonerate the estate, for the benefit of the heir, and remainder-men. A bequest of a general residue does not comprise money, over which

(*o*) *Davers* v. *Dewes*, 3 P. W. 40.

(*p*) *Browne* v. *Grombridge*, 4 Madd. 495.

(*q*) *Jackson* v. *Kelly*, 2 Ves. 286.

(*r*) *Shrewsbury* v. *Shrewsbury*, 3 Bro. C. C. 125.

the testator has a power of appointment, without reference to the power (*s*); nor will such a bequest comprise trust money (*t*). Under the term "securities for money," will pass stock (*u*), bonds, mortgages, bills, &c., but not bank notes, which are considered to be money (*x*); though, it may be remarked, that a mortgage would be converted into real estate by a conveyance of the equity of redemption. *Attorney-General* v. *Bowyer*, 5 Ves. 303. Under a bequest of "a silver tea-kettle, and lamp, with the appurtenances," will pass the kettle and lamp, and the box in which they were kept, but these words will not be extended to the tea-pot (*y*). Under a bequest of "my flock of sheep, now on such a hill," sheep produced afterwards, and comprising part of the same flock, will pass, the flock being a collective body (*z*). Under a bequest of "stock in trade," will be included, shop goods, and utensils in trade, and, according to the opinion of Price, J. money in a till will, pass under such

*"Securit for mone*

*"Tea-ke tle, &c."*

*"Flock sheep."*

*"Stock trade."*

(*s*) *M'Leroth* v. *Bacon*, 5 Ves. 166.

(*t*) *Randal* v. *Hearle*, 2 Anstr. 365.

(*u*) *Dicks* v. *Lambert*, 4 Ves. 730.

(*x*) *Southcot* v. *Watson*, 3 Atk. 232.

(*y*) 1 Eq. Ca. Abr. 201, pl. 13.

(*z*) *All Souls' College* v. *Codrington*, Ib. 1 P. W. 598.

a bequest (*a*). Under a general bequest of "stock in trade," in the enumeration of which the word "things" occurred, it was held money at a bankers passed, because without such money, under the circumstances of the case, the trade could not be carried on (*b*). Under a bequest of "stock of cattle absolutely," will pass all the cattle the testator has at his decease, and such legacy will not be restricted by a subsequent bequest, in the same will, of a farm and the stock and crop thereon (*c*). Under a bequest of "stock," will pass funded property, though the fund is mistated, provided there was not any stock of the description given, belonging to the testator at the date of his will (*d*); and though stock be standing in the names of trustees, it will pass under a bequest of stock "standing in my name," the testator not having any stock standing in his name at the date of his will, or at his death (*e*); but a bonus will not pass with a specified quantity of stock (*f*), though it will by a bequest of

*tock of tle."*

*tock."*

(*a*) *Seymour* v. *Rapier*, Burr. 29.

(*b*) *Stewart* v. *Earl of Bute*, 3 Ves. 217; S. C. 11 Ves. 666; *sed vide* 1 Dow. P. C. 73.

(*c*) *Randall* v. *Russell*, 3 Meriv. 190.

(*d*) *Door* v. *Geary*, 1 Ves. 256; *Penticost* v. *Ley*, 2 Jac. & Walk. 207.

(*e*) *Hewson* v. *Reed*, 5 Madd. 451.

(*f*) *Norris* v. *Harrison*, 2 Madd. 268.

ertain stock generally (*g*). A testatrix recited hat she was possessed of a certain sum of stock, nd bequeathed the same, or so much as ould be standing in her name, at her death, *A.* (*h*): the testatrix had more than the sum equeathed at the date of her will, and at her eath; it was held that the legatee was entitled the sum bequeathed only, from the intenon (*i*). So where a testatrix, being possessed f 6,000*l.* 4 per cent Consols, made several equests to the amount of 3,200*l.*, and by a odicil, after reciting that she had given away ,600*l.* 4 per cent Consols, gave the remaining 00*l.* to *A*, *A.* was held to be entitled to the hole residue (*k*); the testatrix having probably onsidered, that the various legacies she had iven would, on the sale of her stock, be equialent to 5,600*l.* 4 per cent Consols, and that he testatrix merely meant to give *A.* the esidue, and that the statement of the amount as not to regulate the quantum, but merely n amplification in the description of the resilue. Where the trust of personalty was to pay, n the first place, all debts; secondly, to pay

"Quantum."

(*g*) *Paris* v. *Paris*, 10 Ves. 85.

(*h*) *Hotham* v. *Sutton*, 15 Ves. 319.

(*i*) *Attorney-General* v. *Pyle*, 1 Atk. 435; *Parsons* v. *Parsons*, 1 Ves. J. 266.

(*k*) *Danvers* v. *Manning*, 1 Cox, 203.

*B.* 300*l.* on bond, where the testatrix owed *B.* 120*l.* only on bond, yet it was held that *B.* was entitled to 300*l.* (*l*). And under a bequest of a debt, though the amount be mistaken, the sum owing will pass (*m*); nor will the mistake of the amount of a specific bequest defeat the legacy of it (*n*). After a bequest of the interest of all testator's consols to *A.* for life, giving her a power to dispose of 5,000*l.* part thereof, the testator added, "after *A.*'s decease, I give two-thirds of the above interest to *B.* and *C.*;" and the latter bequest was held to refer to the residue of the consols bequeathed, after the deduction of 5,000*l.* part thereof (*o*). Where a bequest was to *A.* of 3 or 400*l.*, the construction ought, it was said, to be made liberally, and 400*l.* was held to pass (*p*), every act being taken most against the agent. Thus, where a testator intended to give his daughter 20,000*l.* and he appointed to her 15,000*l.*, having only a power to appoint 10,000*l.*, and gave her 5,000*l.* besides, it was held she was, from the intention, entitled to 20,000*l.* Indeed, where the meaning of a testator is plain, it shall pre-

(*l*) *Whitfield* v. *Clemment*, 1 Meriv. 402.

(*m*) *Williams* v. *Williams*, 2 Bro. C. C. 87.

(*n*) *Ashton* v. *Ashton*, 3 P. W. 384.

(*o*) *Whitmore* v. *Trelawny*, 6 Ves. 134.

(*p*) *Seale* v. *Seale*, 1 P. W 290.

vail against the words of the will, though they are apparently contrary to the intention: thus, where a testator, reciting that his daughter was entitled to sums of money equal to 6,500 *l.*, gave her 3,500 *l.* to make up 10,000 *l.*, which the testator declared he designed for her fortune; the daughter being entitled to 5,500 *l.* only, it was held that the testator meant his daughter should have 10,000 *l.*, and it was decreed that the deficiency should be made up from his estate, because legacies given for provision of children ought to be construed liberally (*r*). And where a testator directed his executors to invest sufficient in the funds to answer an annuity of 250 *l.*, and after the death of the annuitant the principal was given over; the executors (neglecting to invest the money, and the funds having risen,) were decreed to pay the legatees over such sum, as, if invested in the funds, would yield an annuity of 250 *l.* (*s*). And a will has been referred to a Master in Chancery to examine and see what legacies are given, where it has been written blindly, illegibly, and in figures (*t*). Again, where the

(*q*) *Phipps* v. *Mulgrave*, 3 Ves. 613.

(*r*) *Milner* v. *Milner*, 1 Ves. 107.

(*s*) *Barrett* v. *Deady*, 3 Madd. Rep. 453.

(*t*) *Masters* v. *Masters*, 1 P. W. 425.

figures in a bequest were illegible, an issue was sent to a jury to try the fact, whether one or other figure were intended (*u*). It may be remarked, that the legatee is bound to answer the duty charged on his legacies (*x*); and express provision is made by the stat. 36th Geo. III. c. 52, s. 7, rendering gifts, mortis causâ, liable to the duty imposed by that act. And even where a person was domiciled in India, and died on his passage homewards, and administration was taken out to him in India, and also in England, by a person who was one of his residuary legatees, which legatee was domiciled in Scotland, yet it was held that the legatee was liable to pay the legacy duty on his legacy, and other legacies paid out of money remitted to England, because he was, in fact and in law, an administrator of the property in England (*y*); though where a testator gives a legacy exempt from the duty, and substitutes a larger legacy for the former, stating his intention to increase the former legacy, such substituted legacy shall likewise be exempt from the legacy duty (*z*). And

"Legacy duty."

(*u*) *Norman* v. *Morrell*, 4 Ves. 770.

(*x*) *Bartesdale* v. *Gulliat*, 1 Swanst. 562.

(*y*) *Attorney-General* v. *Cockerell*, 1 Price, 165; *Attorney-General* v. *Beatson*, 7 Price, 560.

(*z*) *Cooper* v. *Day*, 3 Meriv. 154.

where a bequest is directed to be paid without any deduction, the executors are obliged to bear the burthen of the legacy duty, though in other cases the legatee must pay it (*a*).

"Uncertainty in the thing given."

Bequests may be ineffectual from the uncertainty in the description of the thing intended to be given; as a bequest to *B.* of some of my best linen (*b*); or a bequest of all that may remain after *B.*'s (the tenant for life's) decease, who has an absolute power over the property (*c*); or a bequest of a specified sum, or thereabouts; sed quære this last point, since the maxim is, "*certum est quod certum reddi potest.*" And a legacy may likewise be void, because the purpose for which it is given is not allowed by the rules of law; as a bequest of money to obtain a dukedom; the same cannot be so applied, since it is said to be illegal to obtain honour by money (*d*). For the like reason, a bequest in part liquidation of the national debt, is ineffectual, the purpose being void (*e*); and the Lord Chancellor, in this last case, directed the sum,

"void."

(*a*) *Bartesdale* v. *Gulliat*, 1 Swanst. 562.

(*b*) *Peck* v. *Halsey*, 2 P. W. 387.

(*c*) *Bull* v. *Kingston*, 1 Meriv. 314; sed quære *Durour* v. *Motteux*, 1 Ves. 321; *Seale* v. *Seale*, 1 P. W. 290.

(*d*) *Earl of Kingston* v. *Lord Pierrepont*, 1 Vern. 5.

(*e*) *Newland* v. *Attorney-General*, 3 Meriv. 684.

so bequeathed, to be transferred to such person as the King, under his sign manual, should appoint.

## CHAP. II.

### *Of Legatees.*

It has been observed, that every person may be a legatee, if sufficiently designated (*a*). It will now be attempted to show, who will be entitled to take under bequests to persons answering a particular description or class, as children, heirs, relations, next of kin, &c.

The general rule is, that under a bequest to a class of persons, to vest in possession at the testator's death, all answering the description, and in esse, at that period, will be entitled, this being the time at which the objects are to be ascertained, and the division to take place; and for these reasons, when the fund is given to be enjoyed at a future period, all persons born before that period, and in esse at the specified time, will be entitled (*b*). Again,

(*a*) *Delmare* v. *Rebello*, 3 Bro. C. C. 446.

(*b*) *Gilmore* v. *Severn*, 1 Bro. C. C. 582; *Crone* v. *Odell*, 1 Ball. & B. 449, 489; confirmed 3 Dow. Parl. Cases, 61.

where a bequest is made to one for life, with a limitation over after the death of the tenant for life, to a class of persons, as children, &c. all persons answering the description at the testator's death, and who from time to time shall answer the description previous to the division of the fund, viz. during the life of the tenant for life, and who shall be in ventre sa mere at the death of the tenant for life, will be entitled; and the representatives of such of those deceased legatees, who have answered the description subsequent to the testator's death, and before such division, will be entitled, equally, with those legatees who shall be in esse at the time of division (*c*). In all these cases the court acts from an anxiety to provide for as many children as possible, with convenience; therefore, any children coming in esse before a determinate share becomes distributable to any one of the children, will be included (*d*); provisions for children are always regarded in a favourable light in courts of equity, and are preferred before other voluntary disposi-

(*c*) *Devisme* v. *Mello*, 1 Bro. C. C. 537; *Middleton* v. *Messenger*, 5 Ves. 140; *Crone* v. *Odell*, 1 Ball. & B. 449; S. C. affirmed 3 Dow. Parl. Cas. 61.

(*d*) *Barrington* v. *Tristran*, 6 Ves. 349; *Matchwick* v. *Cox*, 3 Ves. 611.

tions (*e*). And it is said, by the Master of the Rolls, in *Godfrey* v. *Davis*, 6 Ves. 49, that "a bequest to any person, not as personâ designatâ, but under a qualification and description at any particular time, the person answering the particular description at that time is the person to claim; and if there be any person answering that description, they are not to wait to see whether any other persons shall come in esse, but the fund is to be divided among those capable of taking, when, by the tenor of the will, the testator intended the property to vest in possession; and if there be not any person answering the description at the time specified, then the legacy fails." Thus, a bequest by *A.* to his children, or to all his children (*f*); or a similar bequest by *A.* to the children of *B*, who is dead (*g*); or a bequest to the children of *D*, who is living; or to every child *A.* hath (*h*); being a bequest to a class of persons; will, in either case, entitle those children, answering the description at the date of the will, and who shall answer the description previous to the testator's death, either as being actually

*"Children."*

(*e*) *Milner* v. *Milner*, 1 Ves. 107; *Rigden* v. *Valier*, 2 Ves. 258; *Gawey* v. *Hilbert*, 19 Ves. 125.

(*f*) *Singleton* v. *Gilbert*, 1 Cox, 68.

(*g*) *Viner* v. *Francis*, 2 Bro. C. C. 658.

(*h*) *Ringrose* v. *Bramham*, 1 Cox, 384.

born, or en ventre sa mere (*i*), provided the children survive the testator; and though one person only shall answer the description of the class, at the time of division, yet that person will be entitled to the whole fund (*k*), to the exclusion of any child or children who may be born subsequent to such division; as might happen in the bequest to the children of *D*, who was living at the date of the testator's will, and at his decease (*l*). So under a bequest to "my children living at my death," all the children of the testator, at his decease, as well an eldest as a younger child, and notwithstanding the eldest be entitled, as tenant in tail, to the estate out of which the charge is to be raised (*m*), and even a child of his en ventre sa mere (*n*), will be entitled. Under a bequest of 100*l.* a piece to all the children of *B.* living at

(*i*) *Doe* v. *Clarke*, 2 H. Black. Rep. 399.

(*k*) *Doe* d. *Stewart* v. *Sheffield*, 13 East. Rep. 533, and 535, and cases cited; *Doe* v. *Clarke*, 2 H. Black. 399; *Crone* v. *Odell*, 1 Ball. & B. 459; *Matchwick* v. *Cox*, 3 Ves. 610; *Roberts* v. *Higman*, 1 Bro. C. C. 532; over ruling *Northey* v. *Strange*, 1 P. W. 342; *Martin* v. *Wilson*, 3 Bro. C. C. 324.

(*l*) *Heath* v. *Heath*, 2 Atk. 121.

(*m*) *Incledon* v. *Northcote*, 3 Atk. 438.

(*n*) *Beale* v. *Beale*, 1 P. W. 246; *Burdet* v. *Hopegood*, 1 P. W. 487; *Millier* v. *Turner*, 1 Ves. 85; *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. S. 83.

his death, will be entitled a child en ventre sa mere (*o*): and under such a bequest, all the children of *B*, though by divers women (*p*), will be entitled. And where a bequest was "to such children of *A*. as *B*. shall think most deserving, and that will make the best use of it: or to the children of my nephew *C*, if any such there are, or shall be;" it was held that all the children of *A*. and *C*. were entitled, *B*. having died in the testator's lifetime (*q*). It is observable, that a bequest may be confined to children living at the death of the testator, though maintenance may be given to children born subsequent to that period, out of the same fund; as where the gift was immediate, with a direction for payment at a future period, and maintenance for all the testator's children was ordered to be raised out of the interest of the fund, till paid (*r*). A will may, by express words, or by inference, refer to children living at the date of the will; as a bequest to the

(*o*) *Beale* v. *Beale*, 1 P. W. 244; *Garland* v. *Mayat*, 2 Vern. 105; *Ringrose* v. *Bramham*, 2 Cox, 384; *Ib.* 425; *Gawey* v. *Hibbert*, 19 Ves. 125.

(*p*) *Barrington* v. *Tristram*, 6 Ves. 349.

(*q*) *Brown* v. *Higgs*, 4 Ves. 719; S. C. 5 Ves. 501; S. C. affirmed 8 Ves. 574.

(*r*) *Freemantle* v. *Taylor*, 15 Ves. 363.

children of *A*, by name (*s*); or a bequest to the six children of *A*, who then had that number of children (*t*): and here it may be remarked, that if the testator had mistaken the number of children, yet those children who were living at the time of making the will, would be entitled (*u*); since otherwise, the bequest would be void for uncertainty: but where a bequest was made to the son and daughter of *A*, (*A*. having four sons and one daughter,) it was held that the son could not take, for the uncertainty; but, as the legacy was given in joint-tenancy, the daughter should take the entirety, as being alone capable under the description (*x*). If a bequest be made to the children of *A*, (who takes a life interest in the fund,) in remainder after her death, then all the children *A*. has at the death of the testator, or may have afterwards, will be entitled (*y*); and will take

*"Children at death of tenant for life, or after the death of a person in being."*

(*s*) *Eccard* v. *Brooke*, 2 Cox, 213; *Viner* v. *Francis*, 2 Bro. C. C. 658; *Crone* v. *Odell*, 1 Ball. & B. 449, *et seq.*; *Doe* v. *Sheffield*, 12 East, 537, n. (a).

(*t*) *Sherer* v. *Bishop*, 4 Bro. C. C. 58; S. P. 416; *Gawey* v. *Hibbert*, 19 Ves. 125; *Wheedon* v. *Tell*, 2 Atk. 123; *Stanley* v. *Wise*, 1 Cox, 432.

(*u*) *Stebbing* v. *Walkey*, 2 Bro. C. C. 85; *Gawey* v. *Hibbert*, 19 Ves. 125.

(*x*) *Dorset* v. *Sweet*, Ambl. 175.

(*y*) *Attorney-General* v. *Crispin*, 1 Bro. C. C. 386; *Eccard* v. *Brooke*, 2 Cox, 213; *Devisme* v. *Mello*, 1 Bro. C. C. 538; *Taylor* v. *Langford*, 3 Ves. 120; *Middleton* v. *Messenger*, 5 Ves. 140; *Lord Douglas* v. *Chalmer*, 2 Ves. J. 506.

vested interests, which will, on their death in the lifetime of *A*, devolve to their personal representatives; unless the bequest be expressly confined to children living at the time (*z*) of the decease of the tenant for life, or to the respective times of the decease of tenants for life, of particular funds (*a*). If, however, a bequest be made to the children of *A*, after the death of *B*, who is living at the testator's death, all persons who shall answer the description of legatees, between the period of the testator's death and the death of *B*, will be entitled, notwithstanding they may die before the tenant for life (*b*). And where a bequest is made to the children of *A*, born or to be born, the gift is immediate to those children living at the testator's death, and to those who may be born during the life of *A*, though the time of division is postponed till the decease of *A*, because all the objects of the testator's bounty cannot be ascertained before that time; therefore, all *A.*'s

*"Children born, or to be born."*

(*z*) *Dawson* v. *Hawes*, Ambl. 276; *Spencer* v. *Bullock*, 2 Ves. 690; *Reeves* v. *Brymer*, 4 Ves. 698; *Browne* v. *Groombridge*, 4 Madd. 495.

(*a*) *Gaskell* v. *Harman*, 6 Ves. 169.

(*b*) *Sheppard* v. *Ingram*, Ambl. 448; *Hatch* v. *Hatch*, 1 Eden. Rep. 342; *Ellison* v. *Airey*, 1 Bro. C. C. 386, 542; S. C. 1 Ves. S. 111; *Leake* v. *Robinson*, 2 Meriv. 382; *Crone* v. *Odell*, 1 Ball. & B. 483; *Browne* v. *Groombridge*, 4 Madd. 495; *Ayton* v. *Ayton*, 1 Cox, 327.

children, alive at the time of the testator's decease, or born before *A.*'s death, will be entitled (*c*); for the bequest is vested in those children living at the testator's death, though liable to be divested to the extent of such parts as, on *A.*'s death, will belong to her subsequent born children (*d*). After-born children may, from the intention, be included; as where a bequest was to *A*, the son of *B*, (who had not any other child at the date of the testator's will, or at his decease,) with a limitation over, if *A.* die under twenty-one, to all the other children of *B.* equally (*e*). Where a bequest is given to a class of persons, as the children of *A*, payable at a particular and future time (*f*), or

(*c*) *Defflies* v. *Goldsmidt*, 1 Meriv. 417.

(*d*) *Sheppard* v. *Ingram*, Ambl. 448; *Exell* v. *Wallace*, 2 Ves. 119.

(*e*) *Haughton* v. *Harrison*, 2 Atk. 329; *Bateman* v. *Roach*, 9 Mod. 104.

(*f*) *Wild's Case*, 6 Co. 16, b.; *Congreve* v. *Congreve*, 1 Bro. C. C. 592; *Bartlett* v. *Hallister*, Ambl. 334; *Exell* v. *Wallace*, 2 Ves. 117; *Andrews* v. *Partington*, 3 Bro. C. C. 401; *Singleton* v. *Singleton*, 1 Cox, 68; *Ayton* v. *Ayton*, 1 Cox, 327; *Gilmore* v. *Severn*, 1 Bro. C. C. 581; *Hughes* v. *Hughes*, 3 Bro. C. C. 352; S. C. 434; *Prescot* v. *Long*, 2 Ves. J. 690; *Hoste* v. *Pratt*, 3 Ves. 730, 733; *Barrington* v. *Tristram*, 6 Ves. 345; *Whitbread* v. *St. John*, 10 Ves. 152; *Sansbury* v. *Read*, 12 Ves. 75; *Halifax* v. *Wilcock*, 16 Ves. 168; *Walker* v. *Shore*, 15 Ves. 122; *Defflies* v. *Goldsmidt*, 1 Meriv. 419; *Browne* v. *Groombridge*, 4 Madd. 495; *Crone* v. *Odell*, 1 Ball. & B. 449; S. C. 3 Dow. Parl. Cases, 61; *Smith* v. *Streathfield*, 1 Meriv. 360.

on the happening of one of several events, or at the arrival of one of several periods, all persons answering the description at the testator's death, and who shall answer the description before the happening of the event, or arrival of the time, on or at which, the division is to take place, and *then in esse*, will be entitled, to the exclusion of posthumous children, and those who die before the period of division (*f*). A bequest to the children of *A*, payable, as to sons, at twenty-one, and as to daughters, at that age or on marriage; on the attainment of twenty-one by a son, or on marriage by a daughter, the children in esse at the happening of the first of these events, and then answering the description, will be alone entitled. Here the period of vesting and time of division is considered blended, and to be one and the same; or as the same idea is otherwise expressed, the time of payment is of the substance of the gift. In *Hoste* v. *Pratt*, 3 Ves. 733, which is a very strong case, there was a direction, as to the interest of money given to trustees, to apply the same in the maintenance and education of all and every the children of *A*, by his present wife, until they shall severally and respectively attain their several and respective ages of sixteen years; and as and when

(*f*) *Sansbury* v. *Read*, 12 Ves. 75; see cases (*f*) last page.

the said children shall severally and respectively attain their said ages of sixteen years, in trust to pay the residue of his estate and effects, with the interest that might accumulate, equally to and among all the said children of *A*, by his present wife, when and as they severally and respectively shall attain their ages of sixteen years; and it was held that those children only who were living when the eldest attained sixteen, were entitled, and posthumous children were excluded: the fund was, in this case, considered by the testator to be entire at a particular time, at which period, the division was to take place (*g*). And where there was a devise of an estate, in trust for sale, after limitations in strict settlement, with a direction that the produce should be distributed amongst the three sons and daughter of *A*, or the survivors or survivor of them; it was said, these latter words will not generally prevent the vesting at the death of the testator; but here the gift is at the time of distribution, and those persons who are alive at that period, are alone entitled (*h*). But such general construction may

(*g*) *Mills* v. *Norris*, 5 Ves. 338.

(*h*) *Hoghton* v. *Whitgreave*, 1 Jac. & W. 151; *Bartlett* v. *Hallister*, Ambl. 344; *Brograve* v. *Winder*, 2 Ves. J. 634; *Horsepool* v. *Watson*, 3 Ves. 383; see, however, *Hollingsworth* v. *Hollingsworth*, cited 6 Ves. 528; *Elwin* v. *Elwin*, 8 Ves. 547; 13 Ves. 335.

be varied from the context and intention of the parties; as where a testator contemplates the fund to be entire, and means it to accumulate, and shows an intention to let in all the children of certain persons (*i*). As, also, where a disposition was of a residue "to the children of *L. J.*, share and share alike, with a limitation over on failure of *L. J.*'s issue;" it was held, all the children *L. J.* should ever have would be entitled equally, and that the share of the children would be vested, subject to be divested in part, at least, by the birth of subsequent born children of *L. J.*, so as to let in such subsequent born children equally with those previously born (*k*). Where a devise of real estate was on trust to sell, and the trust of the money arising from the sale was, after the life estates of *A.* and *B*, (husband and wife,) to divide the same amongst all and every the issue, child or children, of *A.* by *B*, and their representatives, equally, share and share alike; it was held, that the children of *A.* and *B*, living at the testator's death, were entitled; and in the event of the death of any of them, their issue,

(*i*) *Mills* v. *Norris*, 5 Ves. 338.

(*k*) *Sheppard* v. *Ingram*, Ambl. 448; cited in *Thellusson* v. *Woodford*, 4 Ves. 287.

as representatives, should be entitled to the share of the child so dying (*l*).

"*Bastard or illegitimate children.*"

Under a bequest to children, bastards, or such children as are born out of wedlock or before marriage (*m*), are not included; even though a testator, being a married man, have not any other children. If such a bequest be made by a bachelor, who cannot have any children, contemplated such by law, then, to give effect to a bequest by him to children, natural children are allowed to take, as a class of persons, and as having acquired the character of the testator's children by reputation (*n*). As a natural child acquires his reputation only from birth (*o*), no general prospective provision can be made for illegitimate children unborn (*p*); but a provision for such a child, though unborn, may be made by an adequate designation, *e. g.* a bequest to the child that *A*, (who is unmarried,) is enseint

(*l*) *Horsepool* v. *Watson*, 3 Ves. 384.

(*m*) *Hart* v. *Durand*, 1 Anstr. 684; *Cartwright* v. *Vawdy*, 5 Ves. 530; *Godfrey* v. *Davis*, 6 Ves. 43.

(*n*) *Beachcroft* v. *Beachcroft*, 1 Mad. 430; *Wilkinson* v. *Adam*, 1 Ves. & B. 423; *Lord Woodhouslie* v. *Dalrymple*, 2 Meriv. 419.

(*o*) 1 Inst. 2, b.; *Metham* v. *Duke of Devonshire*, 1 P. W. 530.

(*p*) *Arnold* v. *Preston*, 18 Ves. 288; *Wilkinson* v. *Adam*, 1 Ves. & B. 422.

with (*q*). A deposit with executors for the benefit of the testator's reputed children, has been considered a good gift to them (*r*). And legatees, described by name, will take, though the description of them may be erroneous; as a bequest to *A*, *B*, and *C*, the legitimate children of *D*, of *E*, &c. while, in fact, the same children were illegitimate (*s*): *utile per inutile non vitiatur*, and *certum est quod certum reddi potest*, are the maxims governing cases of this description. Under a bequest to children, grandchildren and other more remote issue are excluded; unless it be the apparent intention of the testator, disclosed by his will, to provide for the children of a deceased child. But such construction can arise only from clear intention, or necessary implication; as where there are no other children than grandchildren (*t*), or where the term children is further explained by a limitation over in default of

(*q*) *Evans* v. *Massey*, 8 Price, 22; *Gordon* v. *Gordon*, 1 Meriv. 144; *Wilkinson* v. *Adam*, 1 Ves. & B. 446; *Earl* v. *Wilson*, 17 Ves. 528; *River's Case*, 1 Atk. 410; *Lord Woodhouslie* v. *Dalrymple*, 2 Meriv. 419.

(*r*) *Powell* v. *Cleaver*, 2 Bro. C. C. 510, 516.

(*s*) *Standen* v. *Standen*, 2 Ves. J. 589.

(*t*) *Gale* v. *Bennett*, Ambl. 681; *Crooke* v. *Bookering*, 2 Vern. 106; *Royle* v. *Hamilton*, 4 Ves. 437; *Reeves* v. *Brymer*, 4 Ves. 694; *Godfrey* v. *Davis*, 6 Ves. 43; *Radcliffe* v. *Buckley*, 10 Ves. 195, 201.

issue (*u*). A bequest to younger children, will vest in those persons who shall answer the description at the testator's death, or at such other period as is pointed out for the ascertainment of the objects and division of the fund; and children, born after the time of division, will be excluded (*x*). If the bequest, where no time is fixed for payment or division, had been to *A.*'s younger children, born and to be born, then children answering the description at the death of the testator, and also posthumous children, would have been included (*y*); and therefore, under such a general bequest, a younger child at the testator's death, who afterwards becomes the eldest, will be entitled to his share as a younger child (*z*). If, however, the bequest be to the younger children of *A*, payable when the eldest attains twenty-one, a younger son, becoming an eldest son before the time of division, would be excluded, because, at the period of division, he does not answer the description of a

"Younger children."

(*u*) *Wyth* v. *Blackman*, 1 Ves. J. 196; S. C. Ambl. 555, cited 3 Ves. 258.

(*x*) *Gravers* v. *Royle*, 1 Atk. 509; *Horsley* v. *Challoner*, 2 Ves. S. 84; *Loder* v. *Loder*, 2 Ves. 532; *Teynham* v. *Webb*, 2 Ves. 206.

(*y*) *Horsley* v. *Challoner*, 2 Ves. S. 84; *Defflies* v. *Goldsmidt*, 1 Meriv. 419.

(*z*) *Coleman* v. *Seymour*, cited Ambl. 349; S. C. 1 Ves. 210.

younger child (*a*). Where there was a bequest to younger children, with a residuary bequest to the eldest son, and a provision that if any of the testator's younger children should die under twenty-one, their respective legacies should be divided between all the survivors; it was held, on the death of a younger child, the eldest should have his share of such deceased child's portion or legacy with the other children (*b*). It is to be observed, that a daughter, though the eldest child, shall take under a bequest to younger children, where a son runs away with the property, because the eldest child is, in contemplation of law, that person who takes the family estate (*c*); therefore, a youngest child, being a son, and taking the family estate (*d*), will be excluded under a bequest to younger children, though, in truth, he be the youngest child (*e*): provided the bequest proceeds from a parent, or a person in loco parentis, for a younger child is never considered as an

(*a*) *Hall* v. *Hewer*, Ambl. 204; *Bowles* v. *Bowles*, 10 Ves. 177.

(*b*) *Lady Lincoln* v. *Pelham*, 10 Ves. 166; *Bowles* v. *Bowles*, ib. 177; *Hieron* v. *Ley*, Ambl. 569; *Hill* v. *Smith*, 1 Swanst. 195.

(*c*) *Northey* v. *Strange*, 1 P. W. 342; *Beale* v. *Beale*, 1 P. W. 244; *Butler* v. *Duncombe*, 1 P. W. 451.

(*d*) *Pierson* v. *Garnet*, 2 Bro. C. C. 37.

(*e*) *Northey* v. *Strange*, 1 P. W. 342.

eldest child, except between a parent, or a person in loco parentis, and children (*f*).

Even though the eldest son does not take the family estate, yet, if he be excluded by answering the description, he cannot claim under a bequest to younger children (*g*), even though he were not the eldest until the time of division (*h*). An only child, however, though the eldest, may take under a bequest "to the youngest child of *A*, born or to be born within five years, or other specified period (*i*)," if born within the limited time. But under a bequest to each and every of my daughters, a younger and posthumous son, though unprovided for, cannot take (*k*). Under a bequest to all "my daughters, or daughters children, as shall be living at *A.*'s death," "or" was construed "and," and all the testator's daughters, and children of living and deceased daughters, living at the decease of *A*, were held entitled (*l*): and where a bequest was to two brothers and a sister, or their children, a similar construction was

*"Daughters, or their children."*

(*f*) *Hall* v. *Hewer*, Ambl. 204.

(*g*) *Bowles* v. *Bowles*, 10 Ves. 177.

(*h*) *Ibid.*

(*i*) *Emery* v. *England*, 3 Ves. 232; *Duke* v. *Doidge*, cited 1 P. W. 244, n. 1. *contra.*

(*k*) *Matchwick* v. *Cox*, 3 Ves. 611.

(*l*) *Richardson* v. *Sprang*, 1 P. W. 434, n. 2.

made (*m*), and it was held, that all answering the description at the testator's death, should be entitled. Where a bequest was to the sole use of *J. S*, or of her children, for ever; *J. S.* was held entitled to a life interest only, with remainder of the principal to *J. S.*'s children (*n*); but it is apprehended this case has been overruled by the cases before cited (*o*).

rand-
ren."

Under a bequest to grandchildren, those persons who answer that description at the testator's death, or other time of division, will alone be entitled, unless the testator have not any children of that description at his decease; when, under a similar bequest, the construction will, to answer the intention of the testator, be extended to those grandchildren to be born (*p*). Where a bequest was of a residue to the grandchildren of *A*. (*q*), and all and every child and children of *B*, the testator's daughter, which she now has, or may hereafter have by her present or future husband, to be paid to them as soon as they shall be able to receive and discharge the same; each grandchild of *A*, living at the

(*m*) *Brown* v. *Higgs*, 4 Ves. 708; S. C. 5 Ves. 495; *Longmore* v. *Broom*, 7 Ves. 125.

(*n*) *Newman* v. *Inglehall*, 1 Cox, 341.

(*o*) *Supra*, n. (*m*).

(*p*) *Houghton* v. *Harrison*, 2 Atk. 329; *Heath* v. *Heath*, ib. 122, n. 2.

(*q*) *Exell* v. *Wallace*, 2 Ves. 119.

testator's decease, and each child of *B*, then born, or afterwards coming in esse, was held to be entitled to a vested interest, to be varied as to the amount, and payable at a future period: but where a bequest was of a residue to grandchildren, by name, and a subsequent appropriation by a codicil of 1,000*l.*, to secure an annuity to *A.* for life, then to form part of the residue again, those grandchildren only who were born at the date of the will, as republished by the codicil, and alive at the testator's death, were held entitled (*r*); and the abstracting of the 1,000*l.* from the residue, being for a particular purpose, was held not to be subject to a different construction. And where a residue was given to six grandchildren, the name of one being repeated, and the name of one omitted, yet it was held they were all entitled equally (*s*): and a similar construction would have been made, if the bequest had been to my four grandchildren, when the testator had, at the date of his will, five grandchildren; all would have been entitled (*t*). Under the

(*r*) *Hill* v. *Chapman*, 3 Brown, 390; S. C. 1 Ves. J. 416.

(*s*) *Garth* v. *Merick*, 1 Bro. C. C. 30; *Gawey* v. *Hibbert*, 19 Ves. 125.

(*t*) *Scott* v. *Fenhoulet*, 1 Cox, 74; *Stebbing* v. *Walkey*, 1 Cox, 251; *Gawey* v. *Hibbert*, 19 Ves. 125.

description of a grandchild, a great-grandchild may take, if clearly, or by inference, intended to take (*u*): but a person acquiring such title by marriage, has been held not to be included, under the description of grandchildren (*x*).

*"First and second cousins."*

Under a bequest to cousins, first and second cousins, once removed, will take; and therefore, a great niece has been held entitled under such a bequest; the court holding the intention to be, to give legacies to relations not more remote than second cousins (*y*). And where a bequest was "to the descendants or representatives of each of my first cousins, deceased, equally with my first cousins alive;" it was held, that first cousins, who were living at the testator's death, and the descendants of such of the testator's first cousins as died before him, as were the next of kin to deceased first cousins, and living at the time of the testator's decease, were entitled (*z*).

*"Descendants or representatives of first cousins."*

*"Family."*

The term "family," in a will, usually means children; as where a bequest was amongst the families of *A.* and *B*, it was held to be a bequest among their children (*a*): but under

(*u*) *Hussey* v. *Dillon*, Ambl. 603; 2 Eden, 194.

(*x*) *Ibid.*

(*y*) *May* v. *Mazel*, 2 Bro. C. C. 125.

(*z*) *Price* v. *Gorsuch*, 2 Cox, 187.

(*a*) *Barnes* v. *Patch*, 8 Ves. 604; *vide*, however, *Rawlings* v. *Jennings*, 13 Ves. 46.

particular circumstances, and from the context, "family" may be extended to, and be construed to mean a husband; as where a direction was to pay a legacy, as a trustee should consider most beneficial to the legatee and her family, payment to the husband was supported (*b*). The term "family" may, also, from the context, be confined to next of kin (*c*). Under a bequest to descendants, issue will be included, however remote (*d*). Under a bequest to *A.* for life, and afterwards to her children, with a further limitation at the death of *A*, without leaving a child, to the testator's heir or heirs at law; *A.* was one of his three daughters, who were co-heirs and next of kin to the testator at the time of his death; it was held, that persons answering the description at that time were entitled, and therefore the three daughters took vested interests, payable on the stated event; sed dubitatur, whether the term "heirs," relating to personalty, meant next of kin or not (*e*). Again, under a bequest of a residue to the right heirs, on the part of my mother, it was held, those

"Descendants."

"Heirs."

(*b*) *M'Leroth* v. *Bacon*, 5 Ves. 167.

(*c*) *Coleman* v. *Coleman*, 9 Ves. 319.

(*d*) *Crosby* v. *Clarke*, Ambl. 399; *Pierson* v. *Garnet*, 2 Bro. C. C. 35; S. P. ib. 230; *Watler* v. *Stratton*, 3 Bro. C. C. 367.

(*e*) *Holloway* v. *Holloway*, 5 Ves. 403.

persons who answered the description at the death of the testator were entitled, notwithstanding one of those who answered the description, took an annuity under the same will for her life (*f*). Where a bequest was, after the death of persons in esse, having life estates, without leaving issue male, or any descendants of issue male, living at the time of their respective deaths, in trust for such persons as should then be the legal representatives of the testator; it was held, that those who were the next of kin, at the time of distribution, were entitled (*g*). A bequest to the heirs of *A*, has been construed to be a gift to the children of *A*, living at his death (*h*); and though one of the children of *A*. died in the lifetime of the testator, leaving issue, yet it was held, an only surviving child, at the death of the testator, was entitled (*i*). And where a bequest was to *A*. and her heirs, (say children), the word heirs, so explained, has been construed to mean children (*k*): but

(*f*) *Danvers* v. *Clarendon*, 1 Vern. 35; *Jones* v. *Beale*, 2 Vern. 381; *Forster* v. *Sierra*, 4 Ves. 769.

(*g*) *Long* v. *Blackall*, 3 Ves. 490; *Reeves* v. *Brymer*, 4 Ves. 692.

(*h*) *Beaulieu* v. *Cardigan*, Ambl. 533; *Forster* v. *Sierra*, 4 Ves. 766; *Doe* d. *Stewart* v. *Sheffield*, 13 East, 533; *vide* 17 Ves. 347.

(*i*) *Loveday* v. *Hopkins*, Ambl. 274; *Thomas* v. *Bennet*, 2 P. W. 342.

(*k*) *Crawford* v. *Trotter*, 4 Mad. 361.

where a testator made *A.* heir to his estate generally, or of his real and personal estate, blending the two properties together, the person answering the description of heir to the real estate, will be absolutely entitled to the real and personal estate (*l*); but if the real estate had been given to his heirs, and the personal estate had, by a separate clause, been also given to "his heir," it is apprehended the personalty would have belonged to the next of kin of the testator (*m*). Where a bequest was to *A*, and failing him by decease before me, to his heirs; *A.* died in testator's lifetime, and it was held, *A.*'s next of kin at the testator's death were entitled (*n*). Where a bequest was of a residue of personal estate to "next kin or heir-at-law, whom I appoint my executor, after my debts and funeral expenses are paid;" being decreed void for uncertainty, was held distributable according to the statute of Distributions (*o*).

(*l*) *Wilson* v. *Vansittart*, Ambl. 562; *Jackson* v. *Kelly*, 2 Ves. 285; *Wythe* v. *Thurlston*, Ambl. 555; *Holloway* v. *Holloway*, 5 Ves. 399; *Gwynne* v. *Muddock*, 14 Ves. 489; *Rose* v. *Rose*, 17 Ves. 347.

(*m*) *Gwynne* v. *Muddock*, 14 Ves. 489.

(*n*) *Vaux* v. *Henderson*, cited in *Horseman* v. *Abbey*, 1 Jac. & Walk. 388; *Holloway* v. *Holloway*, 5 Ves. 399.

(*o*) *Lowndes* v. *Stone*, 4 Ves. 651.

*Issue."*

Under a bequest to the issue of *A*, all *A.*'s descendants, viz. children, grandchildren, &c., are included (*p*); and they take as joint-tenants, and consequently per capita. And issue, when they take a bequest by way of substitution, will be confined to the issue of persons living at the date of the testator's will, because the issue merely claim in substitution of their parents, and no parent of such issue would have been entitled unless a legatee, or, in other words, unless living at the date of the testator's will (*q*): but the term issue may be explained to be children, and the representatives of deceased children (*r*); or issue may, from the context, be confined to children (*s*). And where a testator directed the residue of his personal estate to be invested in the funds, the interest thereof to be paid equally between his five sisters for their natural lives; and in case any of his said sisters should die, leaving issue, to pay that share of the residue, of which his sister so dying was entitled at the time of her decease to receive the interest, unto "all and

(*p*) *Davenport* v. *Hanbury*, 3 Bro. 257; S. C. 3 Ves. 258; *Hockley* v. *Mawbrey*, 1 Ves. 157; *Emery* v. *England*, 3 Ves. 232.

(*q*) *Christopher* v. *Naylor*, 1 Meriv. 320.

(*r*) *Horsepool* v. *Watson*, 3 Ves. 383; *Sibley* v. *Perry*, 7 Ves. 522.

(*s*) *Sibley* v. *Perry*, 7 Ves. 531.

every such child and children of such deceased sister, equally between them, share and share alike, at their respective ages of twenty-one;" one of the sisters died in the lifetime of the testator, leaving children, and the court held the children of such deceased sister were entitled (*t*).

A bequest to legal representatives, is held to point to such persons as are next of kin to the testator (*u*), by the stat. 22 & 23 Car. 2, c. 9, and 29 Car. 2, c. 3; but a bequest to personal representatives, has been held to entitle the executor (*x*). And where a bequest was to the legal representatives, with an appointment of *A.* executor, who was likewise residuary legatee, and one of the next of kin, it was held that the next of kin, according to the stat. 22 & 23 Car. 2, c. 9, were entitled (*y*). Where a bequest was to children and their representatives, issue were held to be entitled (*z*). A bequest to next of kin, is confined to those who are entitled under the stat. of Distributions, 22 & 23 Car. 2, c. 9,

*"Legal representatives."*

*"Personal representatives."*

*"Next of kin."*

(*t*) *Rheeder* v. *Owen*, 3 Brown, 241.

(*u*) *Jennings* v. *Gallimore*, 3 Ves. 146; *Bridge* v. *Abbott*, 3 Bro. C. C. 224.

(*x*) *Evans* v. *Charles*, 1 Anst. 128.

(*y*) *Jennings* v. *Gallimore*, 3 Ves. 148; *Bridge* v. *Abbott*, 3 Bro. C. C. 224.

(*z*) *Horsepool* v. *Watson*, 3 Ves. 383.

in the nearest degree only (*a*), and does not include those who claim by representation, nor a wife (*b*); and if given to next of kin after a life estate, the bequest shall be confined to and divided amongst those who answer the character at that time (*c*); otherwise the next of kin at the testator's decease will be entitled. And where next of kin claim in default of appointment, they must take according to the rules of the statute, in the same proportions and per stirpes (*d*). A bequest to relations generally, or to each of the relations of *A.* and *B*, was not formerly confined to relations within the statute of Distributions, 22 & 23 Car. 2, c. 9 (*e*); but later decisions have confined a bequest, under similar terms, to those persons who would be entitled under that statute, on an intestacy (*f*), either at the death of the tes-

*"Relations."*

(*a*) 14 Ves. 385; vide *Phillips* v. *Garth*, 3 Bro. C. C. 68.

(*b*) *Garrick* v. *Jones*, 14 Ves. 372, 383.

(*c*) *Colebeck* v. *Jones*, 8 Ves. 38; *Miller* v. *Eaton*, Cowp. 272; *Maturn* v. *Savage*, 1 Sch. & Lef. 111; *Hartrington* v. *Harte*, Cox, 131, *contra*.

(*d*) *Oke* v. *Heath*, 1 Ves. 141.

(*e*) *Beale* v. *Jones*, 2 Vern. 28.

(*f*) *Pierson* v. *Garnet*, 2 Bro. C. C. 229; *Rayner* v. *Mowbray*, 3 Bro. C. C. 235; *Anon.* 1 P. W. 327; *Harding* v. *Glyn*, 1 Atk. 469; *Widmore* v. *Woodroffe*, Ambl. 636; *Pigot* v. *Pigot*, 1 Ves. 335; *Whithorne* v. *Harris*, 2 Ves. 527; *Green* v. *Howard*, 1 Bro. C. C. 31; *Brandon* v. *Brandon*, 2 Wils. 14; *Isaac* v. *Defirez*, 17 Ves. 373, n.

tator (*g*), or such other period as shall be marked out (*h*) for the division of the property or ascertainment of the objects, and those persons only who are alive at the time of distribution will be entitled; so that a person answering the description, as being one of the next of kin, at the testator's death, but dying before the distribution or division, will not transmit any interest, under such a bequest, to his personal representatives (*i*). And a bequest to such of my nearest relations as my executors shall think the greatest objects of charity, does not vary the rule (*k*), so far as the objects are ascertainable; for they must be confined within the rule before laid down, viz. those pointed out by the statute of Distributions; though a selection may be made amongst such relations (*l*). Nor does the description of such relations, as being the "poorest" of my relations, vary the rule (*m*); though such a description will exclude those

(*g*) *Masters* v. *Hooper*, 4 Bro. C. C. 210; *Holloway* v. *Holloway*, 5 Ves. 399.

(*h*) *Green* v. *Howard*, 1 Bro. C. C. 31; *Harding* v. *Glyn*, 1 Atk. 468; *Jones* v. *Colebeck*, 8 Ves. 38.

(*i*) *Mahon* v. *Savage*, 1 Sch. & Lef. 111.

(*k*) *Edge* v. *Salisbury*, Ambl. 70; *Goodinge* v. *Goodinge*, 1 Ves. 231.

(*l*) *Pope* v. *Whitcomb*, 3 Meriv. 689.

(*m*) *Isaac* v. *Defirez*, Ambl. 595.

relations who are in competent circumstances (*n*). But if a discretionary power be given to the executors or trustees, as a bequest to such poor or needy or other relations, as my executors or trustees shall think fit; such authority will render the case an exception to the general rule (*o*): if, however, the power, or rather authority, be not exercised; or if a similar authority be given to the Court of Chancery (*p*), the general rule is again brought into operation (*q*). It is observable, that though the objects are to be ascertained by means of the statute, yet, notwithstanding that statute, the objects shall take per capita, and not according to the statute (*r*). Where a bequest was of a residue to the testator's relations, in the proportions in which he had given them the other part of his fortune, it was held to be a description of the legatees who had taken the personalty under the will, excluding a devisee, and relations by

(*n*) *Brunsden* v. *Woolridge*, Ambl. 507; *Isaac* v. *Defirez*, 17 Ves. 373, n.; *Mahon* v. *Savage*, 1 Sch. & Lef. 111.

(*o*) *Supple* v. *Lawson*, Ambl. 729; *Mahon* v. *Savage*, 1 Sch. & Lef. 111; *Harding* v. *Glyn*, 1 Atk. 469; *Cowys* v. *Coleman*, 9 Ves. 324; *Pope* v. *Whitcomb*, 3 Meriv. 689.

(*p*) *Gower* v. *Mainwaring*, 2 Ves. J. 110.

(*q*) *Ibid.*

(*r*) *Thomas* v. *Hole*, Cas. T. Talb. 251; *Green* v. *Howard*, 1 Bro. C. C. 31; *Brandon* v. *Brandon*, 2 Wilson, 14; *Phillips* v. *Garth*, 3 Bro. C. C. 64; ib. 234; *Smith* v. *Campbell*, 19 Ves. 400.

marriage, some of whom were legatees of the personalty (*s*); and a wife cannot claim, under such a bequest, as a relation (*t*). But a bequest to each of my relations, by blood or marriage, will be confined to those relations who are entitled under the statute of Distributions, and the husbands or wives of those who are so entitled (*u*). And where a testator gave the residue of his personal estate amongst relations, mentioned in his will; and by a codicil, the testator, after mentioning that he had omitted two of his relations, gave them legacies; these last mentioned relations will be entitled both to their legacies, and also to their share of the residue as next of kin, under the description of relations mentioned in the testator's will (*x*); though a bequest of the residue to legatees before mentioned, may be restricted by construction (*y*). And where a bequest was to my nearest relations of the name of *A*, it was held one of the testator's nearest relations at the decease of the testator, who had changed her name by marriage, was not excluded, be-

(*s*) *Maitland* v. *Adair*, 3 Ves. 231.

(*t*) *Davis* v. *Bailey*, 1 Ves. 84; *Worsley* v. *Johnston*, 3 Atk. 758.

(*u*) *Devisme* v. *Mellish*, 5 Ves. 529.

(*x*) *Sherer* v. *Bishop*, 4 Bro. C. C. 58.

(*y*) *Henwood* v. *Overend*, 1 Meriv. 23.

cause the name was held to be confined to the stock (*z*). Under a bequest to my nearest surviving relations (*a*), in my native country Ireland, it was held that brothers and sisters were entitled, to the exclusion of nephews and nieces; but the bequest was held not to be confined to those living in Ireland at the testator's decease, and sisters of the testator, living in America, were held entitled. Again, where a bequest was, in certain events, to the testator's relation, and the nearest relations, heirs of such nearest relation, for ever; the testator left a half sister, and the nephews and nieces of a half sister, his nearest relations; it was held, the half sister alone was entitled (*b*): and those who are next of kin, at the time pointed out for distribution, will be entitled (*c*), in exclusion of the next of kin of the testator at the time of his death (*d*). It may be observed, that where a testator charged a real estate with a sum of money, and directed it to be paid to the persons who should

(*z*) *Pigot* v. *Pigot*, 1 Ves. 335.

(*a*) *Turner* v. *Turner*, 1 Bro. C. C. 325; *Phillips* v. *Garth*, 3 Bro. C. C. 64; *Garrick* v. *Jones*, 14 Ves. 372; Coop. 275; *Worsley* v. *Johnston*, 3 Atk. 758.

(*b*) *Smith* v. *Campbell*, 19 Ves. 400.

(*c*) *Mask* v. *Mask*, 1 Bro. C. C. 293; *Pierson* v. *Garnet*, 2 Bro. C. C. 229.

(*d*) *Jones* v. *Colbeck*, 8 Ves. 38.

be entitled to the residue of his personal estate, and gave his personal estate (after the discharge of his debts, &c.) to his relations; it was held, the relations were entitled to the sum so raised, exempt from debts (*e*).

"*Servants.*"

Under a bequest to "servants," will be included in and out-door servants, but not stewards of courts and other temporary servants (*f*), nor servants hired by the job. Under a bequest to the three servants who shall be living with me at my death, though the testatrix had four living with her at that time, they shall be all entitled, otherwise the gift would be void for uncertainty (*g*).

"*Unmarried daughters.*"

A bequest to unmarried daughters applies to those daughters who have never been married, and who answer the description at the testator's death (*h*).

"*Eldest son, &c.*"

Where a bequest was to the eldest son, to be begotten, a son born after the testator's death was held entitled (*i*). Where a bequest was to the first son of *A.* of real and personal estate, and to his heirs and assigns for

(*e*) *Killet* v. *Ford*, 1 Cox Rep. 442.

(*f*) *Townsend* v. *Windham*, 2 Vern. 546; *Chilcot* v. *Bromley*, 12 Ves. 114.

(*g*) *Sleech* v. *Thorington*, 2 Ves. J. 564; S. P. 2 Bro. C. C. 36; *Gawey* v. *Hilbert*, 19 Ves. 125.

(*h*) *Maberly* v. *Strode*, 3 Ves. 454.

(*i*) *Neville* v. *Neville*, 2 Vern. 431.

ever, the heir-at-law of *A.* will be entitled to the personal estate and accumulations (*k*). And an eldest legitimate child will be entitled under a bequest (after the gift of several annuities) to the eldest child of *B*, though *B.* had several natural children older than his lawful children (*l*). So a bequest to the second daughter called *A*, will vest in a person answering the description, though a third child (*m*). Where a bequest was to the youngest or seventh child, the youngest child, though the eighth, the seventh having died shortly after his birth, was held to be entitled (*n*). So where a bequest was to *C*, the second son of *B.*; *B.*'s second son was named *A*, yet *A.* was held to be entitled (*o*), *B.* not having any son called *C.*; *utile per inutile non vitiatur*. So a bequest to the youngest child of *A*, within six years; *A.* had one child only within that time, and a child subsequently born, yet it was held the child born within the time, though an only child, was entitled (*p*). And where a bequest was to

(*k*) *Battock* v. *Stories*, 2 Ves. 524.

(*l*) *Godfrey* v. *Davis*, 6 Ves. 48.

(*m*) *Lane* v. *Goudge*, 9 Ves. 225.

(*n*) *West* v. *Primate of Ireland*, 3 Bro. C. C. 148; S. C. 2 Cox, 258.

(*o*) *Stockdale* v. *Busby*, 19 Ves. 381; S. C. Coop. 229.

(*p*) *Emery* v. *England*, 3 Ves. 232.

my nephew *A*, the son of *B.*; the testator had not any brother by the name of *B*, but he had two nephews of the name of *A*, the sons of two other brothers of the testator, and parol evidence was admitted to prove who was intended (*q*).

"Son construed grandson"

Where a bequest was of 60 *l.*, interest of part of a certain sum secured on mortgage, to *A.* for life, residue of interest to *B.* for life; and in case of the death of *B*, to his eldest or only son; and for want of such issue male, to the eldest or only daughter of *B.*; and for want of such issue female, to sink into the residue of the testator's personal estate. After the death of *A*, the testator proceeded: "I give the principal and interest to *B.* if living, but if dead, to the eldest or only issue male of *B*, who shall be then living;" *B.* died, leaving two sons, *C.* and *D.* and one daughter; *C*, died, leaving *E*, his son: and it was held that *E.* was entitled to the surplus interest; but *A.* being still alive, no decree was made as to the principal (*r*).

"Feme covert."

A bequest may be made to a married woman, but it vests in her husband by his marital rights; and payment to the legatee herself, during the life of her husband, cannot be sup-

(*q*) *Careless* v. *Careless*, 1 Meriv. 384.

(*r*) *Duke of Manchester* v. *Bonham*, 3 Ves. 64.

ported (*s*): but if the legacy is not reduced in possession, or virtually transferred, or otherwise equitably acted on by the husband, the same will, on the husband's death in the lifetime of his wife, belong to her as a chose en action (*t*): and it may be observed, that a husband cannot assign his wife's reversionary interest in personal property, because he cannot reduce it into possession (*u*). A legacy may be given to a married woman for her separate use, viz. by declaring that her receipt shall be a good discharge (*x*), or that the same bequest shall be for her separate use (*y*), or for her livelihood (*z*); or if it be directed that a legacy shall be at her disposal, with liberty to do therewith what she should think fit, it will enure to her separate use (*a*); and the rule is the same though no

(*s*) *Palmer* v. *Trevor*, 1 Vern. 261; *Amherst* v. *Selby*, 11 Vin. 377, pl. 8.

(*t*) *Fort* v. *Fort*, C. T. Talb. 171; *Amherst* v. *Selby*, 11 Vin. 377, pl. 8; *Mitford* v. *Mitford*, 9 Ves. 87; *Wildman* v. *Wildman*, ib. 176; *Hornsby* v. *Lee*, 2 Mad. Rep. 16; *Brotherow* v. *Hood*, 2 Com. 725; *Bates* v. *Dandy*, 2 Atk. 207; *Garford* v. *Bradley*, 2 Ves. J. 676; *Macauley* v. *Phillips*, 4 Ves. 18; *Blunt* v. *Bertland*, 5 Ves. 515; *Moody* v. *Matthews*, 7 Ves. 183; *Johnston* v. *Johnston*, 1 Jac. & Walk. 475.

(*u*) *Hornsby* v. *Lee*, 2 Mad. 20.

(*x*) *Lee* v. *Prideaux*, 3 Bro. C. C. 384.

(*y*) *Bennet* v. *Davis*, 2 P. W. 316; *Rolfe* v. *Budder*, Bunb. 187.

(*z*) *Darley* v. *Darley*, 3 Atk. 399.

(*a*) *Kirk* v. *Paulin*, 7 Vin. 95, pl. 43.

trustees are appointed for this purpose, since her husband will be a trustee for her (*b*). Ornaments of the person, given to a married woman, on her marriage, by a stranger, so trinkets given by a husband to his wife, are to be considered as her personal and separate estate, and as distinguished from paraphernalia (*c*). A bequest of bonds to a married woman, to be delivered to her whenever she shall demand or require them, is a bequest to her separate use (*d*). So a bequest to the use of a wife, independent of her husband, creates a separate estate (*e*): and a direction to pay a legacy into her hands, and that her receipt shall be a sufficient discharge (*f*), likewise creates a separate estate: but where there was a bequest to *A*, a feme covert, to her separate use and benefit, with a residuary bequest to her own use and benefit, the residuary bequest was not held to be for her separate use (*g*). And where a man was convicted of felony, and pardoned on a voluntary transportation, a personal estate, which was afterwards bequeathed

(*b*) *Rolfe* v. *Budder*, Barn. 187.

(*c*) *Graham* v. *Londonderry*, 3 Atk. 393.

(*d*) *Dixon* v. *Olmius*, 2 Cox, 414.

(*e*) *Wagstaff* v. *Smith*, 9 Ves. 520.

(*f*) *Browne* v. *Like*, 14 Ves. 302.

(*g*) *Willis* v. *Sayers*, 4 Mad. 409.

to his wife, was decreed to belong to her as a feme sole (*h*). An estate given to a woman for her separate estate, renders a feme covert, for the purpose of disposing, receiving, &c. of such separate estate, free from the disabilities attaching to her married state (*i*). Where, however, a bequest was of a residue to *A*, a married woman, for life, and at *A.*'s death the principal to be divided amongst *A.*'s children, with a direction or declaration that the husband of *A.* should not have any part whatever, but that the same legacy should be entirely for the poor children, the bequest was not considered a separate estate in *A.* for her life, but a mere declaration that after *A.*'s death her husband should not receive any benefit from the bequest (*k*). A husband, though entitled to the benefit of a legacy bequeathed to his wife, is also liable for her conversion of a legacy, of which she may be tenant for life only, even though the wife may live separate from her husband, and he provide her alimony (*l*). The doctrine deducible from *Macauley* v. *Phillips*, 4 Ves. 19 (*m*), is, that personal property of femes

(*h*) *Newsom* v. *Bowyer*, 3 P. W. 37.

(*i*) *Hearle* v. *Greenbank*, 3 Atk. 709.

(*k*) *Brown* v. *Clark*, 3 Ves. J. 167.

(*l*) *Paget* v. *Read*, 1 Vern. 143.

(*m*) S. P. *Johnston* v. *Johnston*, 1 Jac. & Walk. 475.

covert vest absolutely, at law, in their husbands; and they may compel payment of such interests as are legal, or recoverable at law, by using the name of their wives. But legacies which are recoverable only in equity, vest not without the consent of the executor or trustee, or a court of equity; in which latter case, the court usually compels a settlement, to which the wife is privately examined, under the direction of the court; or her consent is sufficient, if a settlement is proposed by the husband, and approved by the court. Notwithstanding the husband has a complete title, at law, to bequests made in favour of his wife (*n*); yet equity will not allow a husband, unless he be a purchaser of his wife's personal estate by settlement, to possess himself of all his wife's property, if she be only lately of age, even though she particularly desire it may be delivered to him (*o*); especially if there be an agreement for a settlement previous to the marriage, which is incomplete(*p*). And though a bequest to the separate use of a wife, vests in her absolutely, yet her assignment or transfer of such separate estate in favour of her husband, would, under circumstances of

(*n*) *Beresford* v. *Hobson*, 1 Mad. 373.

(*o*) *Ex parte Higham*, 2 Ves. S. 579; *Anon.* 2 Ves. S. 672.

(*p*) *Tomkyns* v. *Ladbroke*, 2 Ves. S. 595.

fraud or concealment, be set aside in a court of equity (*q*). Equity sometimes decrees a settlement, even of a wife's separate estate, for her benefit (*r*). The court of equity will not allow a feme covert to consent to the disposal of her property to her husband, before the quantum of it is ascertained (*s*); nor would the court of equity allow of such disposition where the amount was uncertain, even where the wife appeared and consented to the transfer to her husband (*t*); and a feme covert cannot, without her consent taken in court, pass her reversionary interest in personal estate (*u*).

Equity, however, does not usually interfere, unless the parties come under the cognizance of that court. It may be observed, an action at law does not lie against an executor by the husband for his wife's legacy (*x*), because the executor has the legal estate in all the testator's property; besides, if such an action might be maintained, the equity of the wife would often be of no avail, since the court of equity would

(*q*) *Milnes* v. *Busk*, 2 Ves. J. 496.

(*r*) *Griffith* v. *Hood*, 2 Ves. S. 452.

(*s*) *Edmunds* v. *Townsend*, 1 Anstr. 93.

(*t*) *Sperling* v. *Rochfort*, 8 Ves. 180; *Pen* v. *Peacock*, Cas. T. Talb. 43.

(*u*) *Woodlands* v. *Crowcher*, 12 Ves. 174; *Hornsby* v. *Lee*, 2 Mad. 20.

(*x*) *Garford* v. *Bradley*, 2 Ves. J. 673; *Blunt* v. *Bestland*, 5 Ves. 515; *Deeks* v. *Strutt*, 5 Term Rep. 690.

have no power to interfere. For if a husband can obtain his wife's legacy without the aid of the court of equity (*y*), he will become legally and absolutely entitled, and equity will not deprive him of his legal right. Equity requires all coming before its tribunal to do equitably (*z*), and compels a husband to make a provision for the wife out of bequests given to her; though, it is said, equity will not take away the husband's rights, so long as he is willing to live with her, and maintain her; if the husband leaves his wife, equity will impound the money, and direct the interest to be paid to the wife till her husband return, and maintain her (*a*): and the court has, under the peculiar circumstances of the case (*b*), and mal-treatment by the husband, ordered a legacy, given to a wife, to be retained for her separate use for her life, with remainder to the husband for his life, then to the children, if any, and if none, then to the survivor of husband and wife. Bequests

(*y*) *Adams* v. *Pierce*, 3 P. W. 12; *Brown* v. *Elton*, 3 P. W. 204, n. 1.; *Doswell* v. *Earle*, 9 Ves. 473; *Thornwood* v. *University College*, 1 Ves. 540; *Incledon* v. *Northcote*, 3 Atk. 430; *Macauley* v. *Phillips*, 4 Ves. 19; *Johnston* v. *Johnston*, 1 Jac. & W. 475.

(*z*) *Sleech* v. *Thorington*, 2 Ves. J. 562; *Bond* v. *Simmons*, 3 Atk. 19; *Wright* v. *St. Albans*, 11 Ves. 22; *Macauley* v. *Phillips*, 4 Ves. 20.

(*a*) *Jacobson* v. *Williams*, 1 P. W. 383, and n.

(*b*) *Nichols* v. *Danvers*, 2 Vern. 671.

to a wife may, however, even in equity, be paid over to the husband without the wife's consent, before bill filed (*c*). And where the husband and wife were living abroad, in Prussia, (the custom of which country is, for the husband to acquire the property of his wife, and where, on his death, she, by surviving her husband, would be entitled to half of his personal property,) the money was directed to be paid to the husband (*d*). Where a legacy is given to a feme covert abroad, which does not, by the laws of the foreign state, belong to the husband, a commission will be issued to examine the wife as to her consent, that the money should be paid to her husband (*e*). Where money was bequeathed to be laid out in land, for the benefit of a feme covert, with reversion to her in fee (*f*), the Chief Baron of the Exchequer ordered a commission to be awarded to examine her, separate from her husband, touching the money, whether she would have it laid out in land, or receive it in money; and though the certificate was, that she chose to have the money paid to her husband, yet payment was

(*c*) *Macauley* v. *Phillips*, 4 Ves. 20.

(*d*) 1 Anstr. 63, cited *French* v. *Campbell*, 3 Ves. 323.

(*e*) *Campbell* v. *French*, 3 Ves. 323.

(*f*) *Binford* v. *Bowden*, 1 Ves. J. 512; S. C. *Binford* v. *Bowden*, 2 Ves. J. 38; *Hough* v. *Ryley*, 2 Cox, 157.

not ordered without an affidavit from the husband and wife, that there was not any settlement. Assignees under the bankrupt or insolvent laws, claiming in equity, property belonging to the husband in right of his wife, are subject to the same equity to which the husband was liable, and must, therefore, make a settlement on the wife (*g*); but a distinction has been taken (*h*), and it has been said, that assignees at law are liable to such equity of the wife, but that an assignee for valuable consideration is not subject to any such equity (*i*); but this distinction seems over-ruled, especially if there be not any provision for the wife (*k*). This equity is personal to the wife, and ceases on her death, unless the same is completed by contract, or a decree in equity (*l*). The proportion to which a feme covert shall, under these circumstances, be entitled, is discretionary in the court (*m*). It has, however, been

(*g*) *Browne* v. *Clarke*, 3 Ves. 168; *Carr* v. *Taylor*, 10 Ves. 574.

(*h*) *Bosvile* v. *Blander*, 3 Ves. J. 510; *Blount* v. *Bestland*, 5 ib. 515; *Lamb* v. *Milnes*, 5 Ves. 517.

(*i*) *Franco* v. *Franco*, 5 Ves. 515.

(*k*) *Macauley* v. *Phillips*, 4 Ves. 19; *Wright* v. *St. Albans*, 11 Ves. 22.; *Beresford* v. *Hobson*, 1 Mad. 373.

(*l*) *Murry* v. *Lord Elibank*, 13 Ves. 7; *Loyd* v. *Williams*, 1 Mad. 480.

(*m*) *Beresford* v. *Hobson*, 1 Mad. 373, and cases there cited.

repeatedly decided, that she shall not take the whole, even for life (*n*). A bequest to "my wife," refers to that person who was the testator's wife at the date of his will, and not to an after-taken wife, who may survive the testator; if the will were, however, republished after such second marriage, such republication would secure the benefit, under the will, to a future wife (*o*). A bequest to a person who is acting under a false and injurious character, is void, if the misrepresentation be the fraud of the legatee; as where *A.* married *B*, *A.* being then married to another woman, a bequest by *B.* to *A*, as her husband, was not supported (*p*).

*"Wife."*

*"To supposed husband."*

A bequest to a debtor is not, without a clear intention, a release of the debt, further than it is a release to the extent of the benefit to accrue from the legacy (*q*): and even if there be an express release, it will be good only as a release against an executor, and not against creditors (*r*); and if good, it will extend to such

*"Debtor."*

(*n*) *Beresford* v. *Hobson*, 1 Mad. 373; and cases there cited.

(*o*) *Waring* v. *Ward*, 5 Ves. 676.

(*p*) *Jenning* v. *Gallimore*, 3 Ves. J. 146; *Bridge* v. *Abbot*, 3 Bro. C. C. 224; *Kennel* v. *Abbot*, 4 Ves. 802.

(*q*) *Wilmot* v. *Woodhouse*, 4 Bro. C. C. 230; *Sibthorp* v. *Moxom*, 3 Atk. 581; *Elliot* v. *Davenport*, 1 P. W. 86, n. 2; *Jeffs* v. *Wood*, 2 P. W. 132.

(*r*) *Sibthorp* v. *Moxom*, 3 Atk. 580.

debts only as were due at the date of the will (*s*). Even where a bequest is made to one of two debtors, who dies in the lifetime of the testator, there will be a lapse, and the surviving debtor, and the executor of the deceased debtor, will be liable to pay the debts due to the executor or administrator of the testator (*t*): and it has been held, that giving a debtor a legacy, primâ facie discloses an intention not to release the debt, even though the debtor is made executor (*u*).

*"Legatees by reference."*

Legatees may be described by reference; as a bequest of the residue to legatees before-mentioned, in the proportions to which they are entitled under my will (*x*): or a bequest to such of my residuary legatees as shall be living at the respective deaths of *A*, *B*, and *C*, (who were annuitants under the will for their respective lives), in the last case, those only will be entitled who shall be living at the decease of the annuitant of each fund (*y*): and a general bequest of this

(*s*) *Smallman* v. *Goolden*, 1 Cox, 239.

(*t*) *Ixon* v. *Buller*, 2 Price, 34; *Sibthorp* v. *Moxom*, 3 Atk. 581.

(*u*) *Carey* v. *Goodwyn*, 3 Bro. C. C. 110; *Berry* v. *Usher*, 11 Ves. 90.

(*x*) *Nannock* v. *Horton*, 7 Ves. 391; S. P. 10 Ves. 370; *Bonner* v. *Bonner*, 13 Ves. 379; *Henwood* v. *Overend*, 1 Meriv. 23; *Parker* v. *Lea*, 3 Ves. & B. 113.

(*y*) *Gaskell* v. *Harman*, 6 Ves. 169.

description may, by construction, be restricted either to particular legatees, or to legatees by will only, excluding those taking by codicil. Lastly, it may be observed, that if the legatees are not sufficiently designated, or if the name is omitted (*z*), and the difficulty is such as cannot be obviated by parole evidence, the legacy will fail, from the uncertainty in the description of the legatee. Thus, a bequest to *A.* or *B*, will be void for uncertainty; but if the bequest had been to *A.* or *B*, whichever *C.* should choose, the bequest would have been rendered effectual, if *C.* named either of the same legatees (*a*). But a bequest to *A*, and the person with whom she shall first intermarry, (if before she attains the age of twenty-one, by and with the consent of *B.* and *C.*,) for and during their joint lives, with limitations over, is in fact a gift for life to a legatee, to be afterwards ascertained, and may be perfectly good on a subsequent marriage, in conformity with the condition (*b*). So a legacy to the first grandson of *A*, born in the life of *A*, will be good, for it is a certain description of the legatee; and he must take, if

*Uncer-inty in e descrip-n of the gatee."*

*Grand-t."*

(*z*) *Hunt* v. *Hort*, 3 Ves. 311; *Bailey* v. *Attorney-General*, 2 Atk. 239.

(*a*) *Longmore* v. *Broom*, 7 Ves. 129.

(*b*) *Slackpole* v. *Beaumont*, 3 Ves. 97.

at all, within the period of limitations prescribed against perpetuities, viz. during a life in being (*c*). Though a legatee must be certainly described to be entitled (*d*), yet this doctrine must be understood according to the maxim of, *certum est quod certum reddi potest*; therefore, if there be a mistake (*e*), or any ambiguity, such mistake or ambiguity may be explained by external or parole evidence (*f*): the omission of a Christian name has been supplied by parole evidence (*g*); and even where both the Christian and surname were mistaken, a legacy has, on the intention of the testator, ascertained by extrinsic evidence, been supported (*h*). And where there was a bequest to the charity school in *A.*; in which place there were two charity schools, one a free school, and the other a charity school, supported by voluntary contribution, to which latter the testator was a donor, and expressed his concern in the same; it was held, the bequest was made in

"*Mistake or ambiguity.*"

(*c*) *Blandford* v. *Thackerell*, 2 Ves. J. 243.

(*d*) *Delmare* v. *Rebello*, 3 Bro. C. C. 446.

(*e*) *Thomas* v. *Thomas*, 6 Term Rep. 671.

(*f*) See *Parole Evidence*; *Stockdale* v. *Bushby*, 2 Coop. 229.

(*g*) *Price* v. *Page*, 4 Ves. 680; *Thomas* v. *Thomas*, 6 Term Rep. 671; *Smith* v. *Coney*, 6 Ves. 43.

(*h*) *Beaumont* v. *Fell*, 2 P. W. 142; *Eade* v. *Eade*, 5 Mad. 119.

favour of the latter charity, it being commonly called by the name of the charity school (*i*). And again, where a bequest was to all hospitals, the legacy was confined to all hospitals in particular places (*k*). And where a supposed legatee was described by a wrong name, reference was ordered to be made to a Master in Chancery, to ascertain whether that person was intended; and if so, the legacy was ordered to be paid to the intended legatee, though described by a false name (*l*). And where a bequest was of a legacy to John and Benedict, sons of *J. S.*; and *J. S.* had two sons, James and Benedict, but had not any son of the name of John, it was held that James should take (*m*). Again, *W. W.* by will devised his lands to his wife for life, and after her decease, he gave the same lands to his wife's niece, and he proceeded thus, "Item, I give the use of 500*l.* stock for and during her life, but after her decease, I give the 500*l.* among the brothers and sisters of my said wife;" it was held "her" referred to the wife, and not to the niece; and the wife

(*i*) *Attorney-General* v. *Hudson*, 1 P. W. 675.

(*k*) *Masters* v. *Masters*, 1 P. W. 425.

(*l*) *Baldwin* v. *Harpur*, Ambl. 374; *Masters* v. *Masters*, 1 P. W. 425.

(*m*) *Dorset* v. *Sweet*, Ambl. 175; 2 Bro. C. C. 86; 1 Ves. J. 414; *Thomas* v. *Thomas*, 6 Term Rep. 671; 2 Eq. Ab. 415, pl. 5.

was held to be entitled to the 500*l.* stock for her life (*n*). So where a bequest was of the interest of a sum to *A*, till her daughter *B.* attained twenty-four, then, the testator added, "I give and bequeath the principal, and the interest then due, to her said mother *A.*;" *A*, by her answer in Chancery, said, she believed the legacy was intended for *B*, and it was decreed in *B.*'s favour (*o*). Again, a testator, understanding he had two grandchildren in *A*, gave each of them 500*l.*; by a codicil, he revoked these bequests, they being, as he stated in his codicil, both dead; the identity being proved, and the legatees being alive, it was held that they were both entitled (*p*): however, a legatee was, prima facie, presumed to be dead after absence, and no intelligence of such person, for a period of sixteen years, &c. (*q*). Again, where a legacy was referred to, as hereafter given, of 20,000*l.* to *A*, then a gift to *A.* of 30,000*l.*, and reference subsequently to the gift as 20,000*l.*, it was held to be a mistake, and *A.* was declared to be entitled to 20,000*l.* only (*r*). But a

(*n*) *Castledon* v. *Turner*, 3 Atk. 256.

(*o*) *Clarke* v. *Norris*, 3 Ves. 362.

(*p*) *Campbell* v. *French*, 3 Ves. 322.

(*q*) 3 Brown, 509, and notes.

(*r*) *Phillips* v. *Chamberlaine*, 4 Ves. 57.

"Construction." name omitted cannot be supplied (*s*). In case of inconsistency, mistake, or interlineation, the rule is, if, on a general view of the will, the general intent, or a particular object can be collected, and there are expressions in the will in some degree militating against such intention or object, they must be rejected; such expressions cannot, however, be rejected, unless in a case of clear mistake; and if two parts of a will are irreconcileable, the latter must prevail (*t*) The court will not, however, consider an improbability a mistake; to be a mistake, there must be a plain inconsistency; indeed, a mistake cannot be corrected, or an omission supplied, unless it is perfectly clear, by fair inference from the whole will, that there is such a mistake or omission (*u*). And it has been said, that the court cannot correct mistakes, where it does not appear what would certainly have been the disposition of the testatrix, had she disposed of her property conformably to her power (*x*).

(*s*) *Castledon* v. *Turner*, 3 Atk. 258; *Hunt* v. *Hort*, 3 Bro. C. C. 312.

(*t*) *Sims* v. *Doughty*, 5 Ves. 247.

(*u*) *Mellish* v. *Mellish*, 4 Ves. 50.

(*x*) *Smith* v. *Maitland*, 1 Ves. 363.

## CHAP. III.

### *Joint or several Interest of Legatees.*

THE interest of legatees is either joint or several; that is, as between themselves, they are either joint-tenants, or tenants in common. The peculiar quality of a joint-tenancy is this, that on the death of any of the joint-tenants, the interest of such deceased tenant survives to his companion in the tenancy (*a*). The joint interest may, however, be severed, and converted into a tenancy in common; and a severance is created by engaging such a legacy in partnership as a merchant, unless there is an express provision to the contrary (*b*): and a severance may be implied by the general mode of dealing with particular parts of the legacy, manifesting an intention to divide the whole (*c*); but still the other legatees, who shall not have severed the tenancy, will hold jointly, and subject to the same consequence of survivorship. A tenancy in common

(*a*) *Bagwell* v. *Dry*, 1 P. W. 10.

(*b*) *Jackson* v. *Jackson*, 9 Ves. 596.

(*c*) *Crook* v. *De Vandez*, 11 Ves. 333; Co. Litt. 182 a.

is, where the same thing is given to two persons, with an intention expressed or implied by the testator, that they shall have separate and distinct interests, for the purpose of transmission to representatives; though, as between themselves, they hold in nearly the same mode as joint-tenants.

On the death of any tenant in common, in the lifetime of the testator, his share will lapse, and again become part of the testator's general personal estate (*e*); and even though the residue be bequeathed in common, the next of kin will be entitled to such lapsed share. It may be remarked, that the principal of a fund may be given in joint-tenancy, though partial or life interests are previously given, in the same fund, to persons in common (*f*). If the same thing be given by the same will, or by a will and codicil, without any express revocation, to different persons, it is said they shall both take the bequest as joint-tenants (*g*); however, according to n. 144 to 112 a. of Co. Litt. such legatees shall be

(*e*) *Bagwell* v. *Dry*, 1 P. W 700; *Ackerman* v. *Burrows*, 3 Ves. & Beam. 54; notwithstanding *Cook* v. *Berrish*, 1 Vern. 425.

(*f*) *Smith* v. *Streatfield*, 1 Meriv. 358.

(*g*) Prest. Shep. T. 451; *Fane* v. *Fane*, 1 Vern. 30; Swinb. 35, 1025; *Purse* v. *Snaplin*, 1 Atk. 417, *contra*.

either joint-tenants or tenants in common, according to the mode in which they take under the will. A difficulty frequently occurs, in ascertaining whether a bequest be joint or several; and here it may be observed, that all bequests are joint, unless a clear intention of the testator be shown to create in the objects of his bounty an interest, which shall be transmissible to their represensatives; in which cases, bequests shall be construed bequests in common; and the courts, at this day, lean strongly in favour of the latter construction (*h*). Therefore, notwithstanding a dictum to the contrary (*i*), a bequest to two or more persons, simply, or for life, or a longer period, vests in them a joint interest (*k*), whether given to them as legatees or as executors (*l*); and such construction is not to be altered, without a plain and obvious

(*h*) *Hawes* v. *Hawes*, 1 Ves. S. 14; S. C. 3 Atk. 524; *Campbell* v. *Campbell*, 4 Bro. C. C. 17.

(*i*) *Perkins* v. *Bayntum*, 1 Bro. C. C. 118.

(*k*) *Shore* v. *Billingley*, 1 Vern. 482; *Whitmore* v. *Trelawny*, 6 Ves. 129.

(*l*) *Campbell* v. *Campbell*, 4 Bro. C. C. 17; *Blinkhorn* v. *Feast*, 2 Ves. S. 30; *Bagwell* v. *Dry*, 1 P. W. 700; *Jackson* v. *Jackson*, 9 Ves. 597; *Bastard* v. *Stukeley*, 1 Vern. 482; *Crag* v. *Willes*, 2 P. W. 529; *Willing* v. *Baine*, 3 P. W. 114; *Page* v. *Page*, 2 P. W. 488; *Frewer* v. *Relfe*, 2 Bro. C. C. 219; *Stuart* v. *Bruce*, 3 Ves. 633; *Morley* v. *Bird*, 3 Ves. 629; *Whitmore* v. *Trelawny*, 6 Ves. 134.

intention, manifested in the testator's will (*m*); and such persons necessarily take in equal proportions, and if the bequest fails as to one of the legatees, yet those who are capable shall take the entirety (*n*). And where a bequest is given to persons of a particular class; as to the children of *B*, or the grandchildren of *C*, or the children of *B*, and grandchildren of *C*, in each case the legatees will take as joint-tenants per capita, or in equal shares (*o*). The rule is not altered by reason of the bequest being of a residue (*p*); and notwithstanding a direction that the shares shall be equally divided, yet, if the intention disclosed by the will, clearly appears to be that the testator contemplated a joint interest, his intention will be carried into effect (*q*). A bequest may, as to some legatees, be joint, and to other legatees several; as where a bequest was of the interest of a sum to the

(*m*) *Crooke* v. *De Vandes*, 9 Ves. 204.

(*n*) *Humphrey* v. *Taylor*, 2 Ves. 648; S. C. Ambl. 138; *Dorset* v. *Sweet*, Ambl. 175; *Delmare* v. *Rebello*, 1 Ves. J. 415; *Pung* v. *Clay*, 2 Bro. C. C. 187; *Buffar* v. *Bradford*, 2 Atk. 221.

(*o*) *Butler* v. *Stratton*, 3 Bro. C. C. 368; *Blacker* v. *Webb*, 2 P. W. 385; *Phillips* v. *Garth*, 3 Bro. C. C. 68.

(*p*) *Webster* v. *Webster*, 2 P. W. 347; *Baluzuer* v. *Johnston*, 3 Bro. C. C. 457; *Crooke* v. *De Vandes*, 9 Ves. 204; S. C. 11 Ves. 330.

(*q*) *Armstrong* v. *Eldridge*, 3 Bro. C. C. 216; *Scott* v. *Bargeman*, 2 P. W. 68.

children of *A.* and *B*, deceased, for life, equally between them, and at their decease the principal to be divided between the grandchildren of *A.* and *B.*; *A.* died leaving grandchildren, but no children, and it was held the children of *B.* were entitled to the whole interest, and that the grandchildren were not entitled till the death of all *B.*'s children; therefore, *B.*'s children were beneficially, at least, considered joint-tenants (*r*). It is observable, that in a tenancy in common, with a direction for the survivorship of the share of each such tenant under twenty-one, or before marriage, if one die before twenty-one, or before marriage, his share will survive (*s*); but on the death of a second child, his or her original share only will be subject to survivorship, and the part which he received as a survivor, or his accrued share, will not again survive: but accruing shares shall survive, without an express stipulation, if the fund be an aggregate fund, and the will clearly contemplates the death of all the legatees before

(*r*) *Dorset* v. *Sweet*, Ambl. 175; *Malcolm* v. *Marthen*, 3 Bro. C. C. 52; *Armstrong* v. *Eldridge*, 3 Bro. C. C. 215; *Crooke* v. *De Vandes*, 9 Ves. 206.

(*s*) *Ex parte West*, 1 Bro. C. C. 574; *Perkins* v. *Micklethwaite*, 1 P. W. 275; *Vanderzucht* v. *Blake*, 2 Ves. J. 535; *Willing* v. *Bain*, 3 P. W. 114; *Pain* v. *Benson*, 3 Atk. 80; *Milsom* v. *Awdry*, 5 Ves. 465.

any interest shall vest in the persons to be benefited in the ulterior limitations (*t*). Where there was a residuary bequest (after payment of debts, &c.) on trust to invest the principal, and apply the interest to and among the testator's nephews and nieces, (sons and daughters of his brother and sisters, *A*, *B*, and *C*,) equally between them, share and share alike, for their lives; with a direction, that the share of each nephew and niece, on his or her death, should go and be paid to and among his and her children equally; and if any nephew or niece should die without leaving any child or children, his or her share so dying, to go to the survivors or survivor of them, in manner aforesaid; it was held, that the survivors took only a life estate in the surviving shares, which would devolve, on their deaths, to their children; but that on the death of the survivor without issue, there would be an intestacy for his original and accrued shares (*u*). A bequest to two or more persons, as tenants in common, by express words, or to them equally, with benefit of survivorship (*x*); or to them, with a desire that

(*t*) *Warledge* v. *Churchill*, 3 Bro. C. C. 466; *Pain* v. *Benson*, 3 Atk. 78; *Perkins* v. *Micklethwaite*, 1 P. W. 275, & n. 1, *contra*.

(*u*) *Milsom* v. *Awdry*, 5 Ves. 468.

(*x*) *Hawes* v. *Hawes*, 1 Ves. 14; S. C. 3 Atk. 524.

the same may be equally divided (*y*): and notwithstanding the division is not to be made until a future period; as where a bequest was to two, to be equally divided when they should arrive at the age of twenty-one years, with interest from the testator's death (*z*): or after the death of the tenant for life; as where there was an authority to bankers to pay the interest of a sum to *A*. for life, and after her death to pay the same to *B*, *C*, and *D*, and the survivors or survivor of them, during their natural lives, and to permit them, and the survivors or survivor, to receive and take the same in equal shares and proportions (*uu*); or a general bequest of residue to six persons by name, to each a sixth part (*xx*); or a bequest to and amongst *A*, *B*, and *C*. (*yy*); or to them, share and share alike (*zz*); or between them, *A*. and *B*. (*a*);

(*y*) *Armstrong* v. *Eldridge*, 3 Bro. C. C. 216; *Peat* v. *Chapman*, 1 Ves. 542; *Stones* v. *Huntley*, 1 Ves. 166; *Thickness* v. *Vernon*, 1 Vern. 32; *Peatin* v. *Banks*, 1 Vern. 64; *Prince* v. *Heylin*, 1 Atk. 492; *Owen* v. *Owen*, 1 Atk. 494; *Rigden* v. *Vallier*, 3 Atk. 470.

(*z*) *Joliffe* v. *East*, 3 Bro. C. C. 26.

(*uu*) *Russell* v. *Long*, 4 Ves. 554.

(*xx*) *Page* v. *Page*, 2 P. W. 488; *Ryder* v. *Sweet*, Ambl. 175.

(*yy*) *Campbell* v. *Campbell*, 4 Bro. C. C. 17; *Rider* v. *Wager*, 2 P. W. 331; *Ackerman* v. *Burrows*, 3 Ves. & Beam. 54.

(*zz*) *Martin* v. *Wilson*, 3 Bro. C. C. 324; *Rose* v. *Hill*, Burr. 1883.

(*a*) *Lashbrook* v. *Cook*, 2 Meriv. 70.

or to them in equal shares and proportions (*b*); or to several, and the survivors or survivor of them equally (*c*); will, in each case, vest in the legatees, as tenants in common. A similar construction was made (*d*), where a bequest was to *A.* for life, and after her decease to her child or children; but in case *A.* should die and leave no child, the testator directed his executors to pay the principal to *B.* and *C*, share and share alike, or to the survivor of them: it is observable, that in this case both *B.* and *C.* died in the lifetime of *A.* (*e*). A similar construction was made (*f*), where a bequest was (after a life estate) of the principal of the fund, to be divided equally between *A*, *B*, and *C*, to them and their heirs, or the survivor of them, in the order they are now mentioned. A bequest to *A.* and *B.* respectively (*g*); or to *A.* and *B.* jointly and between them (*h*); or to several, to be distributed among them in joint and equal proportions (*i*); will, in either case, create a

(*b*) *Jones* v. *Randall*, 1 Jac. & W. 100.

(*c*) *Doughty* v. *Bull*, 2 P. W. 320.

(*d*) *Perry* v. *Wood*, 3 Ves. 208.

(*e*) *Ibid.*

(*f*) *Smith* v. *Pybus*, 9 Ves. 566.

(*g*) *Heath* v. *Heath*, 2 Atk. 121.

(*h*) *Parkins* v. *Baynham*, 1 Bro. C. C. 118; *Joliffe* v. *East*, 3 Bro. C. C. 25; *Morley* v. *Bird*, 3 Ves. 628.

(*i*) *Ettricke* v. *Ettricke*, Ambl. 656.

tenancy in common. Again, where a bequest was of a term to two, paying 25*l.* a year out of the rents to *A*, during his life, if the term should so long continue, viz. 12*l.* 10*s.* by each of them; the latter words, showing the intention of the testator, were held to create a tenancy in common (*k*). Again, where a bequest was of the interest of a sum to *A.* for life, and the principal was afterwards given to the testator's residuary legatees, who were, in the residuary clause, made tenants in common of such residue, they took the bequest subject to the life of *A*, in like manner, viz. as tenants in common (*l*). Where a bequest was to *A*, *B*, and *C*, and the wife of *C*, equally to be divided amongst them, share and share alike; though the wife of *C.* was of kin to the testator, yet it was held *C.* and his wife took only one-third in common (*m*). A direction to apply the interest of such lot as shall fall to each child, is sufficient to sever the tenancy (*n*). On a bequest to several, in terms creating a tenancy in common, the addition of the words "survivors or survivor" does not alter the con-

(*k*) *Kew* v. *Rouse*, 1 Vern. 263.

(*l*) *Pitt* v. *Benyon*, 1 Bro. C. C. 589.

(*m*) *Bruker* v. *Whalley*, 1 Vern. 233.

(*n*) *Dodson* v. *Hay*, 3 Bro. C. C. 409.

struction, these words being added only to prevent a lapse in the lifetime of the testator; where the legatees are to take at his decease, and according to other cases at a different time, as the time of division, &c. (*o*), and the same words are construed as "other or others" (*p*). It was said by the Master of the Rolls, "whenever there are words plainly importing a tenancy in common, some construction must be put on other inconsistent words, that shall, if possible, relate to some time or other, and not such as would defeat or destroy the effect of the words, importing a tenancy in common (*q*)." To give effect to all the words of a will, survivorship has been confined to the age of twenty-one, in reference to a former clause, in the same will, where survivorship was confined to that age (*r*). And where a bequest was of money, to arise from the sale of real estate, to persons after the death of *A*, who was tenant for life of the fund, and to the survivor or sur-

(*o*) *Cripps* v. *Wallcot*, 4 Madd. 11.

(*p*) *Perry* v. *Wood*, 3 Ves. 206; *Rose* v. *Hill*, Burr. 1883; *Russell* v. *Long*, 4 Ves. 551; *Cambridge* v. *Rous*, 8 Ves. 12.

(*q*) *Russell* v. *Long*, 4 Ves. 554.

(*r*) *Hawes* v. *Hawes*, 3 Atk. 523; *Wilmot* v. *Wilmot*, 8 Ves. 10; *Shergood* v. *Boone*, 13 Ves. 375; *King* v. *Taylor*, 5 Ves. 810; *Daniel* v. *Daniel* 6 Ves. 300.

vivors of them, those only were held to be entitled who were alive at *A.*'s decease; this, as in the former cases, being the period at which the legatees were to receive their legacies (*s*). But where a bequest was given over, in certain events, to *A*, *B*, and *C*, in equal proportions, share and share alike; his, her, or their issue, or the issue of either of them, to take their parents share, "with benefit of survivorship to my said nephews and niece," survivorship was confined to the death of the testator (*t*). Where a bequest was to several, as tenants in common, with a direction, in case of the death of any of them in the lifetime of the testator, or the survivor of his, the testator's, father and mother, that his, her, or their share should be divided among the survivors (*u*); it was held, that those legatees who survived the testator, and his father and mother, were alone entitled to the whole residue, both the original and accumulative shares. And the word "survivors" has been confined to the death of a mother; as in a bequest to *A.* and *B*, and the survivor, for life, and after the death of *A.* and *B*, and

(*s*) *Brograve* v. *Winder*, 2 Ves. J. 634; *Russell* v. *Long*, 4 Ves. 555; *Houghton* v. *Whitgreave*, 1 Jac. & W. 151, and cases there cited.

(*t*) *Maberley* v. *Strode*, 3 Ves. 455.

(*u*) *Painson* v. *Benson*, 3 Atk. 78.

the survivor, to apply the same to the use of all and every the child and children of *B*, who shall or may be living at her death, share and share like, each to receive his or her share at twenty-one; and if but one should so survive, then in trust to pay and apply the whole to such surviving child, on his or her attaining twenty-one (*x*). Under a bequest to persons as a class, *e. g.* to children and grandchildren, relations, &c., they shall take per capita, either as joint-tenants or as tenants in common, according to the different limitations, and not per stirpes (*y*). Thus, where a bequest was to *A.* and *B*, and the children of *C*, or the descendants of *A.* and *B*, equally, they shall take per capita, and therefore equally, exactly as if each legatee had been named: and where the bequest was in trust that executors should pay money unto and amongst testator's two brothers and his sister, or their children, in such shares and at such times as the executors should think proper, all the children living at the testator's death were held entitled, with their parents, per capita: so a bequest to the

(*x*) *Wadley* v. *North*, 3 Ves. 366.

(*y*) *Northey* v. *Strange*, 1 P. W. 344; *Blacker* v. *Webb*, 2 P. W. 383; *Butler* v. *Stratton*, 3 Bro. C. C. 367, and cases there cited.

family of persons named excludes the parents, and all the children of those persons living at the testator's death shall be entitled equally (*z*); though a bequest to the family of *A.* may, from the context, be confined to the next of kin (*a a*).

## CHAP. IV.

### *Of Devises and Bequests to Charities.*

In ancient times, during the prevalence of superstition, and in the dark ages of ignorance and priestcraft, when the confessor swayed the minds of his unlettered victims, and grasped their worldly treasures for the pretended benefit of their souls, and to procure their peaceable entrance to a happy immortality, devises and bequests in favour of superstitious and religious uses, were looked on as acts of virtue, and encouraged to such an extent, that the clergy possessed by far the most valuable property in the kingdom (*a*). When supersti-

(*z*) *Maberley* v. *Strode*, 3 Ves. 450; *Brown* v. *Higgs*, 5 Ves. 495; *Longmour* v. *Broom*, 7 Ves. 124; *Barnes* v. *Patch*, 8 Ves. 604; *Lady Lincoln* v. *Pelham*, 10 Ves. 166; *Smith* v. *Campbell*, 19 Ves. 400.

(*a a*) *Coleman* v. *Coleman*, 9 Ves. 319.

(*a*) *Attorney-General* v. *Day*, 1 Ves. S. 223.

tion began to lose its empire by the diffusion of education, and the minds of the people became better acquainted with the doctrines of religion, and with the character of their spiritual governors, the heirs and relatives of the deceased were regarded more than the useless masses and superstitious prayers of the clergy (*b*).

Such, however, was the influence of the reigning superstition, even so late as the reign of George the Second, and so engrafted in the mind was this infatuation, that Parliament found it necessary to interfere, to prevent any longer the clog on property, by reason of its becoming vested in the Church, or some other manus mortua (*c*). By the stat. 9 Geo. 2, c. 36, intituled, "An act to restrain the disposition of lands, whereby the same become unalienable," after reciting that "gifts or alienations of lands, tenements or hereditaments in mortmain, were prohibited or restrained by Magna Charta and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless, that public mischief had of late greatly increased, by many

(*b*) *Moggridge* v. *Thackerell*, 7 Ves. 69; 22 & 23 Car. 2, c. 10, stat. of Distributions.

(*c*) 2 Black. Com. 268; Duke, ch. Use, by Bridg. edit. 1805, p. 202.

large and improvident alienations or dispositions, made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs;" for remedy whereof it was enacted, "That from and after the 24th day of June, 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal whatsoever; nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements or hereditaments, should be given, granted, aliened, limited, released, transferred, assigned or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever; unless such gift, conveyance, appointment, or settlement of any such lands, tenements or hereditaments, sum or sums of money, or personal estate, (other than stocks in the public funds), be, and be made by deed indented, sealed and delivered,

in the presence of two or more credible witnesses, twelve calendar months, at least, before the death of such donor or grantor (including the days of the execution and death), and be enrolled in his Majesty's High Court of Chancery within six calendar months next after the execution thereof, and unless such stocks be transferred in the public books, usually kept for the transfer of stocks, six calendar months, at least, before the death of such donor or grantor, (including the days of the transfer and death), and unless the same be made to take effect in possession, for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him."

By the 4th section of the same act it was enacted, "That that act should not extend or be construed to extend to make void the dispositions of any lands, tenements or hereditaments, or of any personal estate to be laid out in the purchase of any lands, tenements or hereditaments, which should be made in any other manner or form than by that act directed, to or in trust for either of the two

Universities within that part of Great Britain called England, or any of the colleges or houses of learning within either of the same Universities, or to or in trust for the colleges of Eton, Winchester or Westminster, or any or either of them, for the better support and maintenance of the scholars only upon the foundations of the said colleges of Eton, Winchester and Westminster." By the 5th section, the two Universities of Cambridge and Oxford were restrained from holding more advowsons than should be equal to one moiety of the fellows of each college, or in case of there not being any fellows, then to one moiety of the scholars on the foundation of each college; but this restriction has been repealed by stat. 45 Geo. 3, c. 101.

All devises of lands, therefore, to a charity, with the exceptions before alluded to, are, by the stat. of 9 Geo. 2, c. 36, void; as are also all devises or bequests of interests arising from or partaking of the nature of land. And it may be observed, that copyhold lands are included within the operation of this act (*d*). Thus, a bequest to a charity of a term for years, or

(*d*) *Attorney-General* v. *Hinxman*, 2 Jac. & Walk. 276; *Doe* d. *Howson* v. *Waterton*, 3 Barn. & Ald. 149.

leasehold property (*e*); or of money to arise from or be produced by the sale of land, or by the rents, profits, or other interest arising from land (*f*); or a bequest of money to be laid out in land (*g*); or a bequest of money secured by mortgage (*h*); or a bequest of annuities charged on land, or rather rent-charges (*i*); or a bequest of money, with a direction to apply it in paying off a mortgage charged on certain chapels (*k*); or a bequest of money secured by assessment of poor rates, or county rates (*l*); or turnpike tolls (*m*); these partaking of and being consi-

(*e*) *Shanley* v. *Baker*, 4 Ves. 735; *Jackson* v. *Hurlock*, 2 Eden, 263; *Currie* v. *Pye*, 17 Ves. 462; *Attorney-General* v. *Lord Weymouth*, Ambl. 23; *Attorney-General* v. *Tomkyns*, Ambl. 216; *Attorney-General* v. *Graves*, Ambl. 156; *Paice* v. *Archbishop of Canterbury*, 17 Ves. 364.

(*f*) *Attorney-General* v. *Ward*, 3 Ves. 330; *Pickering* v. *Lord Stafford*, 3 Ves. 335; *Townley* v. *Bedwell*, 6 Ves. 198; *Jones* v. *Williams*, Ambl. 651; *Leacroft* v. *Maynard*, 1 Ves. J. 270; *Mogg* v. *Hodges*, 2 Ves. J. 53; *Arnold* v. *Chapman*, 1 Ves. 110; *Hone* v. *Medcalf*, 1 Bro. C. C. 263; *Campbell* v. *Radnor*, 1 Bro. C. C. 272.

(*g*) *Attorney-General* v. *Graves*, Ambl. 156; *Grieves* v. *Case*, 1 Ves. J. 551.

(*h*) *Attorney-General* v. *Graves*, supra; *Attorney-General* v. *Merick*, 2 Ves. J. 47; *Attorney-General* v. *Winchelsea*, 3 Bro. C. C. 376; *White* v. *Evans*, 4 Ves. 22; *Chapman* v. *Brown*, 6 Ves. 407; *Attorney-General* v. *Caldwell*, Ambl. 635.

(*i*) *Durour* v. *Motteux*, 1 Ves. 322.

(*k*) *Corbyn* v. *French*, 4 Ves. 431.

(*l*) *Finch* v. *Squire*, 10 Ves. 41.

(*m*) *Knapp* v. *Williams*, 4 Ves. 430, n.

dered as real estate, will, in each case, be void by the stat. of Mortmain. So where a devisor directed his real and personal estate to be sold, and the money arising from the sale thereof to be paid to *A*, and *A*. bequeathed such money to a charity, and died before the sale of the real estate, the bequest, so far as related to the money to arise from the sale of the real estate, was held to be void by the stat. of Mortmain (*n*). Even a bequest of money to the corporation of Queen Anne's Bounty was formerly held to be void, because such money must, by the trust of such corporation, be invested in land (*o*). Devises by persons of age, &c. and duly executed, &c. in favour of Queen Anne's Bounty, are now excepted from the operation of the statute of Mortmain, by the 43 Geo. 3, c. 107, which confirmed the act of 2 & 3 Anne, c. 11, s. 4; and personal property may also be given, in the donor's lifetime, to this charity, without deed, by the stat. 45 Geo. 3, c. 84. And devises by such persons, and so executed as aforesaid, to a limited extent, viz. five acres, if executed three months before the

(*n*) *Attorney-General* v. *Harley*, 5 Mad. 321.

(*o*) *Widmore* v. *Corporation of Queen Anne's Bounty*, 1 Bro. C. C. 133; *Widmore* v. *Woodroffe*, Ambl. 636; *Middleton* v. *Clitherow*, 3 Ves. 734.

devisor's death; and bequests to the amount of 500*l.*, if the will be executed as aforesaid; may be made for promoting the building or repairing of churches and chapels, and of houses for the residence of ministers, and for providing churchyards and glebes, by the 43 Geo. 3, c. 108.

A freeman of the city of London may, notwithstanding the stat. 9 Geo. 3, c. 36, devise lands, situate within that city, in mortmain (*p*): and it has been said, that the Bath Infirmary is entitled, by act of Parliament (*q*), to take lands in mortmain (*r*); but such power, which was given by act of Parliament, was only given for the purpose of privileging the infirmary to the extent of acquiring lands without licence, and not for the purpose of enabling such infirmary to take lands contrary to the statute of Mortmain (*s*). As the foregoing act of 9 Geo. 3, c. 36, was restrictive, and operated only from the time of the royal assent, an appointment by devise, subsequent to the statute, in conformity to a power given before the passing that act, was supported; the use arising by the execution of the power, having reference to the

(*p*) *Middleton* v. *Cater*, 4 Bro. C. C. 409.

(*q*) 19 Geo. 3, c. 23.

(*r*) *Markham* v. *Hooper*, 4 Bro. C. C. 156.

(*s*) *Mogg* v. *Hodges*, 2 Ves. S. 53.

deed containing the power (*t*). It may be remarked, if a large personal estate be left to trustees, for a charitable use, which they can execute without the aid of a court of equity, there is nothing in the statute of Mortmain to restrain the trustees from laying out that bequest in land (*u*). The provisions of the statute (*x*) do not extend to Scotland; therefore a bequest to a charity, to be laid out in heritable securities in Scotland, is not within this statute; and it is to be remarked, that mortgages and bonds are heritable securities, or real property, in that part of the dominions (*y*). Nor does this act, being local (*z*), extend to Ireland or to the West Indies (*a*). It is to be remembered also, that by the 4th section of the act of 9 Geo. 2, c. 36, colleges and other establishments for learning are excepted (*b*); but the exceptions are, of bequests to such seminaries

(*t*) *Attorney-General* v. *Downing*, Dick. 414; *Attorney-General* v. *Bradley*, 1 Eden, 482.

(*u*) *Vaughan* v. *Farrer*, 2 Ves. 188.

(*x*) 9 Geo. 2, c. 36, s. 6.

(*y*) *Oliphant* v. *Hendrie*, 1 Bro. C. C. 571; *Mackintosh* v. *Townsend*, 16 Ves. 337.

(*z*) *Campbell* v. *Radnor*, 1 Bro. C. C. 271.

(*a*) *Attorney-General* v. *Stewart*, 2 Meriv. 143.

(*b*) *Attorney-General* v. *Andrews*, 3 Ves. 641; *Attorney-General* v. *Bower*, 3 Ves. 725, 729; *Attorney-General* v. *Tancred*, 1 Eden, 10; *Woorwood* v. *University College*, 1 Ves. 537.

of learning beneficially, and not of bequests to them as trustees for the benefit of others (*c*). And where a devise was made to a college of successive presentations for three turns, or alterations from the then incumbents, with a direction that the college should proceed in future selections; the devise for three turns was supported, but the further words were not extended to give the college a general future nomination (*d*). The statute of 9 Geo. 2, c. 36, did not restrain bequests of personal estate to charitable uses; therefore all bequests to such uses (*e*), as distinguished from superstitious uses (*f*), are still good. Thus, where a bequest was of a residue of personal estate to such charitable purposes as my executors shall think proper, the bequest would have been supported, had not such bequest been, under the circumstances of the case, void for uncertainty in the fund (*g*). And where there was a bequest of a sum in the funds (*h*), and the dividends were directed to be applied towards

(*c*) *Attorney-General* v. *Manby*, 1 Meriv. 327.

(*d*) *Emanuel College Cambridge* v. *Bishop of Norwich et alii*, 4 Bro. C. C. 482.

(*e*) 43 Eliz. c. 4.

(*f*) 23 Hen. 8, c. 10; 1 Edw. 6, c. 14; 1 Geo. 1, st. 2, c. 50.

(*g*) *Cary* v. *Abbott*, 7 Ves. 490; *Chapman* v. *Brown*, 6 Ves. 410.

(*h*) *Attorney-General* v. *Williams*, 4 Bro. C. C. 527.

establishing a school, the bequest was supported, though the trustees were restrained from purchasing or renting land. So where a testator directed a sum to be invested for the benefit of a charity, until it could be laid out in lands to the satisfaction of the trustees; the bequest was supported, as the money could never be well appropriated in the purchase of land for the benefit of the charity (*i*), and because an election was given by the will to the trustees. So if, in a bequest to a charity, an option is given to the trustees to purchase land, or invest in the funds, as distinguished from a recommendation to purchase land (*k*), the bequest may be supported by an investment in the fund (*l*). Where, however, the bequest is of money, with an intent that land shall be bought for charitable purposes, the bequest will be void; though, as before observed, if it clearly appears that the money may, by the trusts of the will, be applied for the benefit of a charity that has lands already settled in mortmain, the bequest will be

(*i*) *Grimmett* v. *Grimmett*, Dick. 251; S. C. Ambl. 210; see, however, *Grieves* v. *Case*, 4 Bro. C. C. 67; S. C. 1 Ves. 548.

(*k*) *Kirkbank* v. *Hudson*, 7 Price Rep. 212; *Doe* v. *Wright*, 2 Barn. & Ald. 710.

(*l*) *Attorney-General* v. *Whitchurch*, 3 Ves. 143; *Carte* v. *Hutton*, 14 Ves. 537.

supported (*m*). Thus, where money was given to trustees for the benefit of a charity, with a direction that the fund should be invested till a purchase could be found, the object being to purchase land, the bequest was declared void (*n*). But where a bequest was to erect a blue-coat school, and establish a blind asylum, with a direction that lands should not be purchased, the bequest was supported (*o*). A bequest to build, or to repair, alter, add to, or improve houses already built on lands in mortmain, will be supported (*p*): but a bequest to erect a school-house, or other charitable building, cannot be supported merely because there is a vacant piece of land formerly appropriated to the same purpose, unless the land be expressly designated as the land on which the

(*m*) *Edwards* v. *Pike*, 1 Eden, 267; *Boson* v. *Stathan*, 1 Eden, 508; *Attorney-General* v. *Nash*, 3 Bro. C. C. 589; *Corbyn* v. *French*, 4 Ves. 431; *Attorney-General* v. *Manby*, 1 Meriv. 327, 345; *Henshaw* v. *Atkinson*, 3 Mad. 306; *Johnston* v. *Swan*, 3 Madd. 457.

(*n*) *Grieves* v. *Case*, 4 Bro. C. C. 68; S. C. 1 Ves. 548; *Grimmett* v. *Grimmett*, Ambl. 210; S. C. Dick. 251.

(*o*) *Henshaw* v. *Atkinson*, 3 Mad. 306.

(*p*) *Attorney-General* v. *Hyde* and *Hutchinson*, Ambl. 752; *Vaughan* v. *Farrer*, 2 Ves. 189; *Attorney-General* v. *Chester*, 1 Bro. C. C. 444; *Attorney-General* v. *Parsons*, 8 Ves. 186; *Attorney-General* v. *Manby*, 1 Meriv. 327; *Attorney-General* v. *Power*, 1 Ball. & B. 145.

school is to be erected (*q*); for a bequest to "erect," imports that land is to be bought, unless the will manifests an intent that it is to be otherwise procured (*r*). So a bequest to a charity for building generally, and without pointing to lands already in mortmain, or a bequest for purchasing a chapel, are likewise void, because the general intention cannot be carried into effect without purchasing land (*rr*). A charitable bequest cannot be defeated by the negligence or default of the person to administer it, or by the impossibility to give effect to every circumstance specified by the testator. If the general object of the testator be charity, consistent with the rules of law, and not against the mortmain act, it shall be carried into effect, without regard to secondary objects intended

(*q*) *Attorney-General* v. *Hyde*, Ambl. 752.

(*r*) *Pelham* v. *Anderson*, 2 Eden, 296; *Attorney-General* v. *Hutchinson*, 1 Bro. C. C. 144, n.; *Attorney-General* v. *Tyndall*, cited *Attorney-General* v. *Chester*, Ambl. 614; 2 Eden, 207; 1 Bro. C. C. 444, n.; *Attorney-General* v. *Nash*, 3 Bro. C. C. 588; *Chapman* v. *Brown*, 4 Ves. 404; *Attorney-General* v. *Parsons*, 8 Ves. 191, over-ruling *Ex parte Foy*, Cox, 163, 316; and *Vaughan* v. *Farrer*, and Lord Hardwicke's doctrine, 2 Ves. 188.

(*rr*) *Attorney-General* v. *Whitchurch*, 3 Ves. 144; *Chapman* v. *Brown*, 6 Ves. 466; 13 Ves. 144; over-ruling *Attorney-General* v. *Bowes*, 2 Ves. S. 547; S. C. 3 Atk. 805.

by the testator (*s*). Thus, where part of the residue of personal estate was bequeathed to some public charity, the bequest was held good, and the executors were allowed the disposition, under the direction of the court of chancery; and they were ordered to propose a charity (*t*). Again, where a bequest was, to such lying-in hospital as my executor should appoint, and the testator afterwards struck out the executor's name, and died without appointing another executor, yet the court supported this bequest and the charity (*u*). So where a bequest was, to such charity as I have directed by my will; after the testator's death, no writing could be found regarding the charity, yet it was held the bequest should be supported, and that the king should appoint the charity (*x*). If a charitable trust ceases for want of objects, the charity must be applied de novo, and a Master in Chancery was, in the case under consideration, directed to propose a plan for

(*s*) *Attorney-General* v. *Whitchurch*, 3 Ves. 144; *Morice* v. *Bishop of Durham*, 9 Ves. 399; S. C. 10 Ves. 522; *Mills* v. *Farmer*, 1 Meriv. 60.

(*t*) *Widmore* v. *Woodroffe*, Ambl. 636.

(*u*) *White* v. *White*, 1 Bro. C. C. 12; *Moggridge* v. *Thackwell*, 1 Ves. J. 475; S. C. 4 Bro. C. C. 394; S. C. 7 Ves. 36.

(*x*) *Attorney-General* v. *Syderfin*, 1 Vern. 224, cited 7 Ves. 71; *Mills* v. *Farmer*, 19 Ves. 483; S. C. 1 Meriv. 60.

the application of the estates, according to the intention of the testator; the trustees of the charity not being amenable to our courts (*y*). If, on a bequest to charities, for particular purposes, and to a given amount, the objects of the testator's bounty be not sufficient to exhaust the whole fund, the amount will be increased for the same purposes, until there shall be more persons fit objects of the testator's bounty (*z*). Indeed, if the fund given become more than adequate for the particular purpose specified by the testator, the court will further the object of the testator by cy pres (*a*).

Where a charity is clearly pointed at, which fails by the death of the trustees, the court of equity will execute the trusts (*b*): but if the charity is vague and uncertain, or void, and no trust interposed, the king is to appoint the fund (*c*), by sign

(*y*) *Attorney-General* v. *City of London*, 3 Bro. C. C. 177.

(*z*) *Attorney-General* v. *Minshull*, 4 Ves. 14.

(*a*) *Bishop of Hereford* v. *Adams*, 7 Ves. 324; *Attorney-General* v. *Wansay*, 15 Ves. 231; *Attorney-General* v. *Earl of Clarendon*, 17 Ves. 491; *Attorney-General* v. *Painter Stainers Company*, 2 Cox, 51; *Ex parte Berkhamstead Free School*, 2 Ves. & B. 139; *Attorney-General* v. *Coopers Company*, 19 Ves. 187.

(*b*) 2 Bro. C. C. 428.

(*c*) *Moggridge* v. *Thackwell*, 3 Brown, 517; S. C. 7 Ves. 36, 69; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 372; *Attorney-General* v. *Wansay*, 15 Ves. 234.

manual, to other charitable purposes (*d*), corresponding to the intention of the testator (*e*); provided the general object of the testator be charity, and such as might be effectual under the stat. 9 Geo. 2, c. 36. As where a bequest was, in trust to educate children in the Roman Catholic religion (*f*), or to found a Jew's synagogue (*g*); the charity being in each case void, as against the established religion, and consequently the policy of the country, yet the general object of the testator being to apply the fund charitably, the use is to be directed by the king's sign manual, sent to the attorney-general. So where a bequest was to be distributed among sixty ejected ministers; being void, it was held the king might appoint the money to a charity (*h*). The courts will not, however, administer a charity in a different manner from that pointed out, unless they see that, though it cannot be literally executed, another mode may be adopted, by which the intention

(*d*) *Attorney-General* v. *William Merrick et al.* Ambl. 712; *Rex* v. *Portington*, 1 Salk. Rep. 162; *Corbyn* v. *French*, 4 Ves. 434, n.

(*e*) *Attorney-General* v. *Andrews*, 3 Ves. 641; *Attorney-General* v. *Bower*, 3 Ves. 725, 729; *Mills* v. *Farmer*, 1 Meriv. 103.

(*f*) *Attorney-General* v. *Foundling Hospital*, 2 Ves. 42.

(*g*) *Cary* v. *Abbott*, 7 Ves. 490; vide *Attorney-General* v. *Pearson*, 3 Meriv. 353.

(*h*) *Attorney-General* v. *Baxter*, 1 Vern. 148.

of the testator may, in substance, be carried into effect, consistently with the rules of law. If the *mode* only becomes impossible, the general object, if attainable, shall not be defeated (*i*): but if the specified and *peculiar charity* of a testator cannot be effected, the legacy shall lapse for the benefit of the heir, or next of kin, or residuary legatee, according to the funds from which the legacy was raised (*k*). A bequest may, however, be partly good and partly void, as a charitable bequest, where the general and particular intent can be separated (*l*): as where the trusts of a devise of real and personal estate were, to take a lease of a house, as a school, and that the children and grandchildren of the testator's relations, of the description specified, should be placed there, for their education, from the age of seven till fourteen, and then be put out as apprentices; and the testator directed other boys and girls to be educated under the superintendance of the Mayor of Bridgewater: Lord Loughborough said, "the

(*i*) *Attorney-General* v. *Whitchurch*, 3 Ves. 143.

(*k*) *De Costa* v. *De Pas*, Ambl. 228; *Attorney-General* v. *Winchelsea*, 3 Brown, 379; *Jackson* and *Sutton* v. *Hurlock*, *et alia*, Ambl. 489.

(*l*) *Phillips* v. *Aldridge*, 4 Term Rep. 264; *Attorney-General* v. *Stepney*, 10 Ves. 22; *Attorney-General* v. *Parsons*, 8 Ves. 186; *Attorney-General* v. *Hinxman*, 2 Jac. & Walk. 276; *Waite* v. *Webb*, 6 Mad. Rep. 71; *Blandford* v. *Thackerell*, 4 Bro. C.C. 394.

charity cannot take effect as a general charity, but I will not therefore condemn the whole will, but will give effect to the particular bounty to these relations (*m*)." He likewise observed, "the testator might have educated all the children of Bridgewater during the time the education of his children and grandchildren of his relations was going on." The direction was, for the education till fourteen, and to give an apprentice-fee, as liberally as the fund would allow. The period being for fourteen years only, was within the rules of perpetuities, and the trust therefore good; and all children and grandchildren born in the lives of the different stocks mentioned in the will, might be within the bounty, without breaking in on the rule of law; though the bequest was held to be confined to the several stocks existing at the time of the testator's death, and the children and grandchildren born in the lifetime of each respective stock. It may be remarked, that an appointment of money to a person, to be employed to charitable uses, or such other purposes as he thinks proper, will give the appointee such an interest in the money, as to make it liable

(*m*) *Blandford* v. *Thackerell*, 2 Ves. J. 241; S. C. 4 Bro. C. C. 394; disapproving *Attorney-General* v. *Bowles*, 2 Atk. 805.

for his debts (*n*); and that a court of equity will not execute an authority, or compel trustees to execute it, when it is discretionary (*o*). If a bequest be given to two charitable purposes, one of which only is bad, the court will apply it solely to that use which is good (*p*). If, however, the principal charitable object of the testator be void, all adjunct and ulterior bequests in support, or in part of the same intent, will likewise fail, as being void (*q*). "If any part," (of a devise or bequest) "in any event," says Lord Eldon, "is to be applied to an illegal purpose, it vitiates the whole (*r*). It may be observed, that all bequests, having for their object the purposes specified by the stat. of 43 Eliz. c. 3, or similar charitable purposes, will be supported as good charitable bequests. Thus, a bequest to the widows and

(*n*) *Hinton* v. *Foy*, 1 Atk. 465.

(*o*) *Cox* v. *Basset*, 3 Ves. 155.

(*p*) *Widmore* v. *Woodroffe*, Ambl. 636; *Attorney-General* v. *Hartley*, 4 Bro. C. C. 414; *Attorney-General* v. *Stepney*, 10 Ves. 22.

(*q*) *Durour* v. *Motteux*, 1 Ves. S. 322; *Grieves* v. *Case*, 1 Ves. J. 551; S. C. 4 Bro. C. C. 68; *Attorney-General* v. *Whitchurch*, 3 Ves. 143; *Chapman* v. *Brown*, 6 Ves. 410; 2 Fonbl. Eq. 208, edit. 1818; *Attorney-General* v. *Davies*, 9 Ves. 535; *Attorney-General* v. *Hinxman*, 2 Jac. & Walk. 270; *Attorney-General* v. *Stepney*, 10 Ves. 22; *Attorney-General* v. *Goulding*, 2 Bro. C. C. 428.

(*r*) 2 Jac. & Walk. 277.

Object of charity, void.

children of seamen belonging to Liverpool (*s*); or a bequest to be employed for the advancement of the Christian religion amongst infidels (*t*); or a bequest to the parish church of St. Helen's, London (*u*); or a bequest to the poor inhabitants of a parish (*x*); or a bequest to dissenting ministers residing in England (*y*); or a bequest to all hospitals (*a*); or a bequest in favour of the poor of the parish of *A.* (*b*); or a bequest to support a botanical garden, as a public benefit (*c*); or a bequest for establishing a school; or a bequest to repair parsonage-houses (*d*); or a bequest for the purpose of establishing a bishop in America (*e*); or a bequest for establishments for learning (*f*); or a

(*s*) *Powell* v. *Attorney-General*, 3 Meriv. 48.

(*t*) *Attorney-General* v. *College of William and Mary in Virginia*, 1 Ves. J. 245.

(*u*) 43 Eliz. c. 4; *Attorney-General* v. *Rupier*, 2 P. W. 127.

(*x*) *Attorney-General* v. *Clarke*, Ambl. 423.

(*y*) *Waller* v. *Childs*, Ambl. 526; *Attorney-General* v. *Cook*, 2 Ves. 276.

(*a*) *Masters* v. *Masters*, 1 P. W. 425.

(*b*) *Attorney-General* v. *Ward*, 3 Ves. 330; *Pickering* v. *Lord Stafford*, 3 Ves. 335; *Attorney-General* v. *Williams*, 4 Bro. C. C. 527; S. C. Cox Rep. 387.

(*c*) *Townley* v. *Bedwell*, 6 Ves. 198.

(*d*) *Attorney-General* v. *Bishop of Chester*, 1 Bro. C. C. 444.

(*e*) *Attorney-General* v. *Bishop of Chester*, *supra*.

(*f*) *Woorwood* v. *University College Oxford*, 1 Ves. 537.

bequest to be applied in bringing water for the inhabitants of Chepstow for ever (*g*); or a bequest to poor relations in perpetuum (*h*); or bequests to preachers of certain dissenting chapels,—are good objects for charitable bequests (*i*). A direction to apply money for benevolent purposes (*k*), or in liberality (*l*), or such like general terms, are not, however, sufficient to indicate the bequests to be charitable. There is not any statute against superstitious uses in general (*m*): the statutes before alluded to (*n*), merely extend to the particular uses restricted by those statutes.

A devise of lands, to be a fund for a perpetual annuity of 10*l.* to a minister, to preach a sermon once a year to the testator's memory, and also 2*l.* to the clerk, and 2*l.* to the sexton, for ever, together with 4*l.* per annum to the

(*g*) *Jones* v. *Williams*, Ambl. 651.

(*h*) *White* v. *White*, 7 Ves. 423; *Attorney-General* v. *Price*, 17 Ves. 371; *Morice* v. *Bishop of Durham*, 9 Ves. 399; S. C. 10 Ves. 522.

(*i*) *Grieves* v. *Case*, 1 Ves. J. 551; S. C. 4 Bro. C. C. 67; *Attorney-General* v. *Pearson*, 3 Meriv. 402.

(*k*) *James* v. *Allen*, 3 Meriv. 17; *Moggridge* v. *Thackerell*, 7 Ves. 69; *Morice* v. *Bishop of Durham*, 10 Ves. 540; *Mills* v. *Farmer*, 1 Meriv. 55, 95.

(*l*) *Morice* v. *Bishop of Durham*, *supra*.

(*m*) *Cary* v. *Abbott*, 7 Ves. 459.

(*n*) *Supra*, p. 258; *Rex* v. *Portington*, 1 Salk. 162.

mayor of *A.* for keeping account thereof (*o*); or a bequest to such purposes as the superior of a convent may judge most expedient (*p*); or a bequest to educate children in the Roman Catholic religion (*q*); or a bequest to support a Jew's synagogue (*r*); or a bequest on condition to repair a family vault (*s*), (as far as concerns the family of the testator),—is a void and superstitious use.

For the purpose of securing the benefit of a bequest to a charity, a testator should expressly charge the personal estate with the payment of such legacies, and direct that they should, if so intended, be paid in the first instance, and prior to all other bequests; and should charge such legacies only as are not charitable on his real estate, as a fund auxiliary to his personal estate, for answering general legacies (*t*).

(*o*) *Durour* v. *Motteux*, 1 Ves. 322.

(*p*) 6 Ves. 567.

(*q*) *Abbott* v. *Cary*, 7 Ves. 495.

(*r*) *Mills* v. *Farmer*, 19 Ves. 483; S. C. 1 Meriv. Rep. 101.

(*s*) *Doe* v. *Pitcher*, 6 Taunt. 359; S. C. 3 Mau. & Sel. 407.

(*t*) *Arnold* v. *Chapman*, 1 Ves. 110.

# PART III.

IN this part we will proceed to consider,

1st, To whom payment of legacies may be made;

2d, At what time payment should be made;

3d, Of interest in default of payment;

4th, Of refunding after payment of legacies;

5th, Of the legatee's remedy to recover his legacy;

6th, Of security to legatees;

7th, Of marshalling assets in favour of legatees;

8th, Of parol evidence.

## CHAP. I.

### *Of the Payment of Legacies.*

PAYMENT of a legacy can be effectually made to such persons only as are legally entitled to, and who are capable of giving a discharge for it: therefore, payment of a legacy to a bankrupt is bad, notwithstanding

the executor may not be aware of the act of bankruptcy. This consequence arises from the policy of our law, which considers every man conversant with the laws and orders of court; especially of so public an act as that which transfers the right of the bankrupt to his assignees (*a*). And where a bequest was, in trust to pay the dividends of a sum to *A.* for his own use, but if *A.* should fail in business before he attained thirty-two, in trust to stand possessed of the sum, and pay the dividends for the support of *A*, and his wife and family; when *A.* should be freed from any embarrassment, then on trust to pay the principal to *A.*: *A.* became involved at twenty-eight, and executed a deed of composition: the Chancellor would not indemnify the trustees assigning the money to *A.* (*b*). Again, payment to an infant, except for actual necessaries (*c*), is ineffectual (*d*), even though the payment be for the purpose of advancement, because an infant is not of sufficient discretion to give a good discharge for the legacy; a confirmation by the infant, however, after he comes of age, of a

(*a*) *Langston* v. *Roylston*, 2 Ves. J. 110.

(*b*) *De Mierre* v. *Turner*, 5 Ves. 308.

(*c*) *Davis* v. *Austen*, 3 Bro. C. C. 178.

(*d*) *Davis* v. *Austen*, 1 Ves. J. 249; S. C. 1 Bro. C. C. 178; *Lee* v. *Browne*, 4 Ves. 362; *Cory* v. *Gerteker*, 2 Mad. 49.

payment made to him while an infant, will be a sufficient discharge from the liability of a trustee; especially if the payment was induced by fraud (*e*). And even though an infant be the residuary legatee and executor, yet payment to him is not allowed (*f*). It is said (*g*); "Trustees of a legacy for infants cannot be permitted to break in on the principal of such legacy, however well employed; indeed the court very rarely breaks in on the legacy of an infant for maintenance, though it frequently will for the purpose of advancement in life." A legacy to an infant cannot even be paid to the father of the infant, though the father is by nature the guardian of his children (*h*). And notwithstanding a testator, on his death bed, directed payment of a legacy to be made to the infant's father, for the benefit of the infant legatee, and the legatee, when he attained the age of twenty-one, acquiesced in the payment to his father, yet such payment was not supported against the claim of the assignees of the infant (*i*): but these decisions have been disap-

(*e*) *Cory* v. *Gerteker*, 2 Mad. 52.

(*f*) *Ex parte Sergison*, 4 Ves. 148.

(*g*) *Walker* v. *Wetherall*, 6 Ves. 474; see *Lomax* v. *Lomax*, 11 Ves. 48.

(*h*) *Rotheram* v. *Fanshaw*, 3 Atk. 629; *Harrel* v. *Waldron*, 1 Vern. 26.

(*i*) *Doyley* v. *Tolferry*, 1 P. W. 286; 1 Eq. Cas. Abr. 300.

proved in subsequent cases (*k*). Payment to a parent may, however, be expressly authorized by the testator in his will (*l*). And by the act of 36 Geo. 3, c. 52, s. 32, legacies given to infants may be paid to the Bank of England, with the privity of the Accountant-General of the court of Chancery, and placed to the credit of the legatee. It is said, trinkets given to infants may be delivered to the father of those infants (*m*). And where a bequest was to *A*, to be equally divided between himself and his family, a payment to *A*. was held good; great stress being laid on the word "himself," as appointing him a trustee to divide the sum (*n*). Bequests to a married woman, unless given for her separate use (*o*), are usually paid to the trustees of her settlement, on the trusts thereof, where a settlement exists, and comprises such property (*p*). Such legacies may, however, be paid to the husband of the legatee, unless settled, because a husband is entitled to all his wife's personalty by the rules of the

(*k*) *Phillips* v. *Paget*, 2 Atk. 81; *Cooper* v. *Thornton*, 3 Bro. C. C. 97.

(*l*) *Fane* v. *Fane*, 1 Vern. 30; *Cooper* v. *Thornton*, 3 Bro. C. C. 98, 185; *Whopham* v. *Wingfield*, 4 Ves. 631.

(*m*) *Hill* v. *Chapman*, 2 Bro. C. C. 613.

(*n*) *Cooper* v. *Thornton*, 3 Bro. C. C. 98, 185.

(*o*) *Hales* v. *Margerum*, 3 Ves. J. 299; *Mores* v. *Huish*, 5 Ves. 694.

(*p*) *Hardwicke* v. *Mind*, 1 Anstr. 274.

common law (*q*). The husband cannot compel payment of legacies given to his wife at the common law (*r*); and except he be a purchaser of his wife's property by settlement, equity will not enforce a payment, unless he makes a suitable settlement on his wife, to the approbation of the court (*s*). The equity of the wife prevails against the assignees of the husband, even though he become a bankrupt, or assign the legacy for a valuable consideration (*ss*). And where the wife of a person, resident in Prussia, became entitled to half of an intestate's property, (in which country half of the husband's property belongs to his wife on surviving), no settlement was ordered by the Court of Chancery, though sought for (*t*). However, an executor, after a suit instituted, cannot pay a legacy given to a feme covert to her husband (*u*).

(*q*) *Beresford* v. *Hobson*, 1 Madd. 373.

(*r*) P. Shep. Touch. 403, n. 8; *Garford* v. *Bradley*, 2 Ves. J. 673; *Blunt* v. *Bestland*, 5 Ves. 515; *Deekes* v. *Strutt*, 5 Term Rep. 690.

(*s*) *Beresford* v. *Hobson*, 1 Mad. 373.

(*ss*) *Ibid.*

(*t*) *Sawer* v. *Shute*, 1 Anstr. 63.

(*u*) *Macauley* v. *Phillips*, 4 Ves. 19.

## *Time of Payment.*

GENERALLY, legacies charged either on real or personal estate are payable at the end of a year from the testator's death, unless a different time be appointed for this purpose (*a*). An annuity given out of the general personal estate, is payable at the end of a year from the testator's death (*b*): but as to annuities payable out of a residue, it is doubted whether they commence till one year after the testator's death, and consequently whether they are payable before the end of the second year; the end of the first year being the period at which the residue is, in contemplation of law, considered as ascertainable (*c*). A legacy may be given, however, immediately, payable at a future period; until which period, of course, payment cannot be demanded (*d*); unless the legatee die before the period appointed, and interest be given in the mean time, in which case the executor or administrator, or other representa-

(*a*) *Sibley* v. *Perry*, 7 Ves. 534; *Storer* v. *Prestage*, 3 Mad. 168.

(*b*) *Gubson* v. *Bott*, 7 Ves. 96; *Fearns* v. *Young*, 9 Ves. 553; *Storer* v. *Prestage*, 3 Mad. 168; *Houghton* v. *Franklin*, 1 Sim. & Stew. 393.

(*c*) *Postea*, 284.

(*d*) *Crickett* v. *Dolby*, 3 Ves. 13; *Heath* v. *Perry*, 3 Atk. 101.

tive of the legatee, may demand payment immediately (*e*). If a legacy, however, bears a less interest than its utmost use, the executor of the testator has a right to the benefit of the legacy, till the time appointed for payment, allowing the modified interest given to the legatee by the will, and discharging the same interest regularly (*f*). A legacy may be payable on the happening of the first of two or more contingencies (*g*), and the time of payment and division may be one and the same. Again, payment may be part of, and annexed to, the substance of the gift; as where the interest only is given for life, with a limitation of the principal to others, it is said, to entitle those in remainder, they must be alive at the time of payment (*h*). Where the time of payment of a legacy is varied, by a codicil, only in a particular event; unless the event happen, the original time appointed will be the time for

(*e*) *Crickett* v. *Dolby*, 3 Ves. 13; *Fonereau* v. *Fonereau*, 1 Ves. S. 119; *Roden* v. *Smith*, Ambl. 589.

(*f*) *Green* v. *Pigott*, 1 Bro. C. C. 105; S. P. *Laundy* v. *Williams*, 2 P. W. 481; *Roden* v. *Smith*, Ambl. 588; *Chester* v. *Painter*, 2 P. W. 336; *Prescot* v. *Long*, 2 Ves. J. 691.

(*g*) *Hill* v. *Chapman*, 11 Ves. 239.

(*h*) *Billingley* v. *Wills*, 3 Atk. 219; *Cloberry's Case*, 2 Ventr, 242; *Batsford* v. *Kebbell*, 3 Ves. 363, cited in *Skey* v. *Barnes*, 3 Meriv. 343.

payment of the legacy (*i*). And where a bequest was of 1,000*l.* to each daughter, charged on land, payable at twenty-two or marriage, with a limitation over, if any daughter died before her legacy should become payable, the share of her so dying to go to the survivors: one daughter died before twenty-two, and unmarried; and the other daughter, on attaining twenty-two, called for the portion of her deceased sister; it was held, she should be paid her proportion of the surviving legacy at the time the legacy would have been payable had her sister lived (*k*): for otherwise the heir, who is always favoured, would have sustained an injury. But where a testator bequeathed several sums to divers children, the legacy of each child to be paid as he and she attained twenty-one; with a clause, that if any child die before he or she attained twenty-one, then his or her legacy to be paid to the survivor or survivors of such children: it was held, that one of the children dying under twenty-one, the share of such child was payable immediately; but these legacies were to be paid out of the personal estate (*l*). And again, it has been stated, that

(*i*) *Wordsworth* v. *Younger*, 3 Ves. 74.

(*k*) *Feltham* v. *Feltham*, 2 P. W. 272.

(*l*) *Laundy* v. *Williams*, 2 P. W. 480.

a person claiming a legacy by virtue of a limitation over, is entitled to immediate payment (*m*). Where a devise was to trustees, to hold till the testator's son should attain twenty-one, then to the son, he paying his grandfather 10*l.* a quarter; it was held, the annuity did not commence till the son attained twenty-one (*n*). As to the value, payment must be made in this country according to the value the coin bears in the country to which the testator belonged, or in which his property was, and not according to its actual value; and the same must be without diminution for costs of remittance (*o*). The statute of limitations does not run against legacies, and an annuity is of this description (*p*): but though time does not run against legacies, yet every presumption that can be urged will be allowed against a stale demand, and such presumption may arise from the act of the parties; the very forbearance to make the demand, affords the presumption either that the claimant was conscious the legacy has been satisfied, or that he

(*m*) *Roden* v. *Smith*, Ambl. 588, cases cited 2 P. W. 480.

(*n*) *Probyn* v. *Turner*, 1 Anstr. 66.

(*o*) *Wallis* v. *Brightwell*, 2 P. W. 88; *Cockerell* v. *Barber*, 16 Ves. 461.

(*p*) *Higgins* v. *Crawford*, 2 Ves. J. 572; *Parker* v. *Ash*, 1 Vern. 256.

intended to relinquish it (*q*). To parties who were ignorant of their rights, and who waived the interest on the sums due before filing their bill, an account was allowed after the lapse of several years (*r*). Again, where money was secured on land, and given to a charity, and applied to that purpose for thirty-five years (*s*); yet a bill by the heir and next of kin, was sustained (*t*): but such stale demands are not countenanced, because it is not to be supposed an executor is to keep accounts for thirty years (*u*).

(*q*) *Pickering* v. *Lord Stafford*, 2 Ves. J. 584; *Hercy* v. *Dinwood*, 2 Ves. J. 89; *Jones* v. *Turberville*, 1 Ves. J. 13; S. C. 4 Bro. C. C. 114.

(*r*) *Pickering* v. *Stafford*, *infra*.

(*s*) *Pickering* v. *Stafford*, 2 Ves. J. 283.

(*t*) *Prescot* v. *Long*, 2 Ves. 620.

(*u*) *Ibid.*

## CHAP. II.

### *Interest.*

As a legacy becomes a debt from the time it is directed to be paid (*a*); or in case of no such direction, at the end of a year from the testator's decease (*b*); the same legacy, in case of delay in payment, will bear interest, as a compensation for the inconvenience the legatee may sustain by such delay. Thus, where a bequest was made to *A.* for life, with a limitation over, *A.* was not held to be entitled to payment till the end of the first year, and therefore he will not acquire any benefit from such a bequest, being merely tenant for life, until the end of the second year, unless the interest be payable oftener than once a year (*c*). It is apprehended, that an executor is never entitled to interest on his legacy, because he

(*a*) *Ellis* v. *Ellis*, Sch. & Lef. 1, 12; 2 Ib. 444; *Palmer* v. *Trevor*, 1 Vern. 261; *Heath* v. *Perry*, 3 Atk. 101; *Wood* v. *Penoyre*, 13 Ves. 333; *Taylor* v. *Hibbert*, 1 Jac. & Walk. 308; *Northcote* v. *Incledon*, 3 Atk. 438; *Crickett* v. *Dolby*, 3 Ves. 12; *Clarke* v. *Ross*, 2 Dick. 529; *Hearle* v. *Greenbank*, 1 Ves. S. 307.

(*b*) *Coleman* v. *Seymour*, 1 Ves. S. 210; *Hearle* v. *Greenbank*, 1 Ves. 310.

(*c*) *Gibson* v. *Bott*, 7 Ves. 96.

has at all times the power of paying himself, if the assets be adequate (*d*). Interest from the end of a year has been allowed, when the payment has been left to the discretion of *A*, who died without paying it (*e*). It has been said, that if a legacy be given generally, the legatee shall be entitled to interest from demand only, unless he is an infant (*f*): this doctrine has however, been over-ruled. So interest on an annuity has been allowed from the time it became due (*g*); but it has also been said (*h*), that interest would only be allowed on an annuity where there are great arrears, and the sum due being three years annuity, and 60*l.* interest was not allowed. Interest is not allowed on arrears of an annuity, and other debts not bearing interest, from the date of a report in Chancery (*i*); unless, it is said, "under an order for further directions, where interest could not, from circumstances, be given by the decree, because the circumstances which made it proper could not appear till the report: or where subsequent interest is given, in respect of gross and wilful misconduct, subsequent to a

(*d*) *Adams* v. *Gale*, 2 Atk. 106.

(*e*) *Churchill* v. *Speake*, 1 Vern. 251.

(*f*) *Snell* v. *Dee*, 2 Salk. 415, *sed quære.*

(*g*) *Litton* v. *Litton*, 1 P. W. 543.

(*h*) *Batten* v. *Earnley*, 2 P. W. 163.

(*i*) *Creuze* v. *Hunter*, 2 Ves. J. 169, note.

decree or order for payment, by delaying the execution of it (*j*)." Where a legacy was charged on real estate, which yielded rents and profits, and no time was specified for payment, interest was formerly allowed from the testator's death (*k*): though, if charged generally on the personal estate, or from a dry reversion, interest was payable only at the end of a year (*l*). This doctrine is now over-ruled, and interest is payable, in each case, from the end of a year only (*m*). Interest is also allowed where a legacy is to arise from the sale of a rent-charge (*n*). It is observable, if the amount of a legacy be paid into court, interest will cease, unless the fund is put out by the court (*o*): however, interest on a specific legacy was allowed from the time of its being paid into court, at 4 per cent, it not being wanted for debts (*p*). No interest, without an express provision for that purpose, is allowed until the period for payment arrives (*q*); and therefore so much as accrues due on a general,

(*j*) See note, 2 Ves. 169.

(*k*) *Maxwell* v. *Wittenhall*, 2 P. W. 26.

(*l*) *Maxwell* v. *Wittenhall*, *ante*.

(*m*) *Gibson* v. *Bott*, 7 Ves. 97; *Pearson* v. *Pearson*, *Lynch et alii*, 1 Sch. & Lef. 12.

(*n*) *Stonehouse* v. *Evelyn*, 3 P. W. 252.

(*o*) *Maxwell* v. *Wittenhall*, *ante*.

(*p*) *Chaworth* v. *Beech*, 4 Ves. 567.

(*q*) *Descramber* v. *Tomkins*, 1 Cox, 137; *Palmer* v. *Mason*, 1 Atk. 505.

as distinguished from a residuary legacy, during the suspense of a contingency on which it is payable, will belong to the person who will ultimately become entitled to the residue (*r*). But where a bequest was of a residue to *A*, to be paid at twenty-one or marriage, and in case *A*. die before twenty-one, &c. then to *B*.; *A*. was held entitled to the produce of the bequest until his interest was defeated, because it was vested, subject to be devested in certain events (*s*). The residue carries interest without any express direction for this purpose, whether got in or not, but only from the end of a year (*t*). In *Sitwell* v. *Bernard*, 6 Ves. 542, the testator directed, that the residue of personal estate, after paying debts, &c. should be invested in land as soon as conveniently might be, and be settled, and that the interest of the residue should accumulate, and be laid out with the principal; it was held, that the tenant for life of the beneficial ownership of the residue, should have the

(*r*) *Butler* v. *Freeman*, 3 Atk. 58; *Studholme* v. *Hodgson*, 3 P. W. 306; *Green* v. *Ekins*, 2 Atk. 473; *Wyndham* v. *Wyndham*, 3 Bro. C. C. 59; *Tyrrell* v. *Tyrrell*, 4 Ves. 1.

(*s*) *Tisson* v. *Tisson*, 1 P. W. 500; *Nichols* v. *Osborn*, 2 P. W. 421.

(*t*) *Sitwell* v. *Bernard*, 6 Ves. 539; *Sisson* v. *Shaw*, 9 Ves. 289; *Tyrrell* v. *Tyrrell*, *supra*; *Taylor* v. *Hibbert*, 1 Jac. & Walk. 308.

interest from the end of a year: "Especially," says Lord Eldon, "because distributing that justice to the tenant for life, is consulting the essential interests of the persons in remainder; for then, from the death of the tenant for life, those in remainder will have the benefit, whether the fund be converted into land or not; and if that is not done, the rule may press as hard on them, and some of them may not have any actual enjoyment of the money." But if the residue be given to one for life, with a limitation over, the tenant for life will not be entitled till the end of the second year (*u*). So where a bequest was to a grandson, and no time of payment was mentioned, and the bequest was given over if he died under twenty-one, it was held the grandson was entitled to the intermediate interest (*x*): but where the bequest is of a fund, whether specific or residuary, to one for life, and on a contingency over; all interest arising between the death of the tenant for life and the contingency over, will form part of the undisposed residue (*y*), for the benefit of the next of kin, unless dis-

(*u*) *Stott* v. *Hollingsworth*, 3 Mad. 161.

(*x*) *Taylor* v. *Johnston*, 2 P. W. 504; *Pearson* v. *Pearson*, 1 Sch. & Lef. 10; *Beckford* v. *Tobin*, 1 Ves. 310.

(*y*) *Wyndham* v. *Wyndham*, 3 Bro. C. C. 58; *Shawe* v. *Cunliffe*, 4 Bro. C. C. 151; *Heath* v. *Perry*, 3 Atk. 103.

posed of (*z*). In cases of fraud or mistake, equity has ordered interest after payment of the principal; and some interest even where a receipt has been given for principal and interest (*a*). Where a testator directed a sum to be raised from real estate, with all convenient speed, interest was allowed from the testator's death (*b*). Where money is directed to be raised under the trusts of a term, and the surplus, after answering particular purposes, to be attendant on the inheritance, with ulterior bequests over to legatees, after various limitations in strict settlement; it was held, the tenants for life were entitled to the interest, and that the money should vest absolutely in the first person entitled to the inheritance of the real estate (*c*). Where the interest given is in its nature depreciating, or capable of immediate sale, but future in enjoyment, a tenant for life is held entitled to interest from the testator's death (*cc*). If a fund be separated from the residue, it shall bear interest, in favour of the

(*z*) *Shaw* v. *Sisson*, 9 Ves. 290.

(*a*) *Earl* v. *Thornbury*, 3 P. W. 128.

(*b*) *Conway* v. *Conway*, 3 Bro. C. C. 270; *Spurway* v. *Glyn*, 9 Ves. 486.

(*c*) *Sheldon* v. *Barnes*, 2 Ves. J. 448.

(*cc*) *Fearns* v. *Young*, 9 Ves. 549; *sed vide Storer* v. *Prestage*, 3 Mad. 167.

legatees, from the testator's death (*d*); since the testator thereby severs this sum from the general personal estate (*e*). Bequests by a parent, or a person in loco parentis, to a child, carry interest from the testator's death (*f*), though payable at a future period (*g*); or to be raised at a future time, even though to arise out of real estate, and notwithstanding the same bequest be contingent (*h*); and whether the legacy be given by way of portion or otherwise (*i*); in case the child is not otherwise provided for. The court considers the parent bound to provide for a child, both for present and future support, and the postponement in payment is considered to be by reason of the infant's incapacity to receive the legacy, but not the fruit thereof (*k*). The same doctrine

(*d*) *Acherley* v. *Wheeler*, 1 P. W. 787; *Tyrrell* v. *Tyrrell*, 4 Ves. 1; *Raven* v. *Waite*, 1 Swanst. 557.

(*e*) *Monkhouse* v. *Holme*, 1 Bro. C. C. 300; *Fonereau* v. *Fonereau*, 3 Atk. 644; *Batsford* v. *Kebbel*, 3 Ves. 363.

(*f*) *Churchill* v. *Speake*, 1 Vern. 251; *Harvey* v. *Harvey*, 2 P. W. 23; *Coleman* v. *Seymour*, 1 Ves. S. 211; *Lowndes* v. *Lowndes*, 15 Ves. 301; *Crickett* v. *Dolby*, 3 Ves. 12; *Ellis* v. *Ellis*, 1 Sch. & Lef. 5.

(*g*) *Raven* v. *Waite*, 1 Swanst. 558, and the last cited cases.

(*h*) *Heath* v. *Perry*, 3 Atk. 102.

(*i*) *Conway* v. *Conway*, 3 Bro. C. C. 270.

(*k*) *Crickett* v. *Dolby*, 3 Ves. 16; *Tyrrell* v. *Tyrrell*, 4 Ves. 15; *Crickett* v. *Dolby*, 3 Ves. 17; *Mitchell* v. *Bower*, 3 Ves. 288.

prevails in regard to a grandchild, even though illegitimate, if the testator stands in loco parentis; but such children or grandchildren must be infants (*l*). It has been held that interest to relations should be allowed before the time of payment (*m*): such favour is now, it is apprehended, only extended for the benefit of children; and not of grandchildren, or illegitimate children (*o*), unless given by a person in loco parentis (*p*); and only in case of infants (*q*). If, however, maintenance be provided till a legacy be paid to a child, the child will not require or be entitled to receive interest (*r*). A wife is not entitled to this indulgence (*s*). Interest on specific legacies of stock

(*l*) *Crickett* v. *Dolby*, 3 Ves. 12, *obiter dictum*; *Crickett* v. *Dolby*, 3 Ves. 16.

(*m*) *Hill* v. *Hill*, 3 Ves. & B. 183; *Archerly* v. *Vernon*, 1 Ves. 311; S. C. P. W. 783; disapproved in *Ellis* v. *Ellis*, 1 Sch. & Lef. 5.

(*o*) *Carey* v. *Askew*, 2 Bro. C. C. 59; S. C. 1 Cox, 243; *vide Perry* v. *Whitehead*, 6 Ves. 546.

(*p*) *Lomax* v. *Lomax*, 11 Ves. 48; *Errington* v. *Errington*, 12 Ves. 20; *Hearle* v. *Greenbank*, 1 Ves. 310; *Lowndes* v. *Lowndes*, 15 Ves. 301; *Hill* v. *Hill*, 3 Ves. & B. 183.

(*q*) *Lowndes* v. *Lowndes*, 15 Ves. 301.

(*r*) *Wynch* v. *Wynch*, 1 Cox, 433; *Ellis* v. *Ellis*, 1 Sch. & Lef. 5; *Crickett* v. *Dolby*, 1 Ves. 17; *Mitchell* v. *Bower*, 3 Ves. 288.

(*s*) *Stout* v. *Robinson*, 11 Ves. 461; *Lowndes* v. *Lowndes*, 15 Ves. 301, over-ruling *Crickett* v. *Dolby*, 3 Ves. 16.

accrues from the testator's decease (*t*), because dividends are not apportionable (*u*), nor is an annuity (*v*). Formerly, where maintenance was left to a child, the father was not allowed to receive it (*x*), especially where the parent was capable of supporting his child (*y*): but in later times, maintenance has been allowed to the parent both for time past and for time to come, and whether the parent be of ability to support his child or not; especially in cases where the infant's fortune is large in comparison with his parent's means of maintaining him (*z*). So a parent is entitled to interest under a bequest to him, the better to provide for his younger children; the court will, however, order the principal of such a bequest to be secured (*a*). Even the principal of a legacy has been broken in on for the purpose of maintenance, where it was very small (*b*): and where a legatee is

(*t*) *Sleech* v. *Thorington*, 2 Ves. 563; *Barrington* v. *Tristram*, 6 Ves. 349.

(*u*) *Pearley* v. *Smith*, 3 Atk. 260; *Sherrard* v. *Sherrard*, 3 Atk. 502; *Rashleigh* v. *Masters*, 3 Bro. 100.

(*v*) *Webb* v. *Shaftsbury*, 11 Ves. 361.

(*x*) *Darley* v. *Darley*, 3 Atk. 399; *Smee* v. *Martin*, Burr. 137.

(*y*) *Jackson* v. *Jackson*, 1 Atk. 513.

(*z*) *Hoste* v. *Pratt*, 3 Ves. 733; *Sherwood* v. *Smith*, 6 Ves. 425; *Sisson* v. *Shaw*, 9 Ves. 288.

(*a*) *Brown* v. *Casamajor*, 4 Ves. 498.

(*b*) *Barlow* v. *Grant*, 1 Vern. 255; *Davis* v. *Austin*, 3 Bro. C. C. 180; *Harvey* v. *Harvey*, 2 P. W. 23.

entitled to a vested interest, and the interest is directed to be accumulated, the court will order maintenance (*c*). Where a testator directed trustees, in certain events, to apply so much of the share of each child, entitled to a vested interest in a legacy, as might be necessary, towards the education and maintenance of such child, with a further direction to accumulate the surplus; necessary maintenance only was allowed, and a reference to a Master in Chancery was directed, to ascertain what was a sufficient maintenance (*d*). Maintenance has, however, been allowed, by the consent of those ultimately entitled to the legacy, from the death of a testator, and before the time of vesting of a legacy, notwithstanding a direction for the accumulation of interest (*e*). Where children have a common interest in the fund, maintenance may be allowed by the court, but not otherwise (*f*): and where an infant has been entitled to two funds, double maintenance has been allowed (*g*).

(*c*) *Errat* v. *Barlow*, 14 Ves. 202; *Stretch* v. *Watkins*, 1 Mad. 258.

(*d*) *Rawlins* v. *Goldfrap*, 5 Ves. 443.

(*e*) *Greenwell* v. *Greenwell*, 5 Ves. 197; *Cavendish* v. *Mercer*, and *Fendall* v. *Nash*, cited 5 Ves. 195; *Lomax* v. *Lomax*, 11 Ves. 48; *Errington* v. *Errington*, 12 Ves. 20; 14 Ves. 202.

(*f*) *Haley* v. *Bannister*, 4 Mad. 275; *Errat* v. *Barlow*, 14 Ves. 204; *Collins* v. *Blackburn*, 9 Ves. 470; *Marshall* v. *Holloway*, 2 Swanst. 436; *Ex parte Kemple*, 11 Ves. 604.

(*g*) *Clive* v. *Walsh*, 1 Bro. C. C. 146.

On the second marriage of a woman, her children by her first marriage must be maintained out of their portions (*h*). Maintenance ought to be sufficiently liberal to a parent, to enable that parent to provide for posthumous children, though unprovided for by the will (*i*): and the court inclined to give maintenance even to a Jew's daughter, who was forty, and whose father was dead, under the stat. 1 Anne, c. 30 (*k*). The amount must, however, be governed by what the children are actually entitled to, and not to their expectancies (*l*). Maintenance, where provided, may be apportioned between the last day of payment of the maintenance, and the time of payment of the legacy (*m*). It may be observed, that interest is not allowed on arrears of maintenance (*n*). The rate of interest formerly allowed by the Court of Chancery, if to arise out of land, was four per cent (*o*); but if payable out of personal estate, the legal rate of interest was allowed, namely,

(*h*) *Billingsley* v. *Cricket*, 1 Bro. C. C. 268.

(*i*) *Burnet* v. *Burnet*, 1 Bro. C. C. 179.

(*k*) *Vincent* v. *Fernandez*, 1 P. W. 524.

(*l*) *Chaplin* v. *Chaplin*, 3 P. W. 369.

(*m*) *Hay* v. *Palmer*, 2 P. W. 501.

(*n*) *Mellish* v. *Mellish*, 14 Ves. 516.

(*o*) *Wood* v. *Briant*, 2 Atk. 523; *Incledon* v. *Northcote*, 3 Atk. 432; Ib. 402; *Beckford* v. *Tobin*, 1 Ves. S. 311.

five per cent (*oo*): and where a bequest was to daughters for portions, out of real and personal estate, with interest for maintenance, it was held, on a deficiency of the personal estate, four per cent only should be allowed (*p*). The like allowance has been made, where a legacy was payable in the currency of Antigua (*q*); though five per cent was allowed on a legacy charged on other West-India property (*r*): and Jamaica interest was allowed till investment, on a bequest of Jamaica currency, with a direction that the same should be invested in the English funds (*s*). Where a bequest was for mourning, to be paid out of the personal estate, the bequest was ordered to be paid with five per cent (*t*). The general rule of the court is, at present, to allow four per cent interest only, whether the legacy be payable either out of the real or personal estate (*u*), except in the

(*oo*) *Wood* v. *Briant*, 2 Atk. 523; *Incledon* v. *Northcote*, 3 Atk. 432; Ib. 402; *Beckford* v. *Tobin*, 1 Ves. S. 311.

(*p*) *Lord Trimleston* v. *Colt*, 1 Ves. 278.

(*q*) *Malcolm* v. *Masters*, 3 Bro. C. C. 53.

(*r*) *Stapleton* v. *Conway*, 1 Ves. 428.

(*s*) *Raymond* v. *Broadbelt*, 5 Ves. 206.

(*t*) *Swynsen* v. *Scawen*, 1 Ves. S. 100.

(*u*) *Sitwell* v. *Bernard*, 6 Ves. 540, 542; *Gibson* v. *Batt*, 7 Ves. 98; over-ruling *Green* v. *Pigott*, 1 Bro. C. C. 103.

case of maintenance for children; and the rate of interest will not be increased, because more is made by an appropriation of a fund to answer the legacy; though the amount of interest may be in effect varied by an arrangement of the parties, as by accepting a mortgage debt in part payment of the legacy (*x*). It is observable, that a tenant for life of land, charged with legacies, must keep down the interest (*y*); and if paid off, he must pay the relative proportion, between the value of the life estate, and the interests of those in remainder (*z*).

(*x*) *Sitwell* v. *Bernard*, 6 Ves. 544.

(*y*) *Bridgman* v. *Dove*, 3 Atk. 200, over-ruling *White* v. *White*, 9 Ves. 554; 2 Ves. & Beam. 65.

(*z*) *Revel* v. *Watkinson*, 1 Ves. S. 93.

## CHAP. III.

## *Of Refunding.*

In some cases, notwithstanding the legatees have received their legacies, they are obliged, on a deficiency of assets, to refund; as where the assets are originally insufficient to pay debts (*a*) or legacies (*b*), and notwithstanding creditors do not claim for a considerable time, viz. eleven years (*c*). A legatee may, however, by his diligence, be entitled as against other legatees to retain his legacy received (*d*). To oblige legatees to refund, a deficiency must exist at the time of payment of their legacies; for a deficiency arising by the devastavit of an executor, will not affect legatees who have received their legacies (*e*). Where an executor pays a legatee beyond the assets voluntarily, yet such legatee is not obliged to refund (*f*), unless the executor becomes insolvent (*g*); and

(*a*) *Noel* v. *Robinson*, 2 Vent. 358; *Anon.* 1 Vern. 162.

(*b*) *Orr* v. *Kaimes*, 2 Ves. 194; *Noel* v. *Robinson*, 2 Vent. 358.

(*c*) *Hardwick* v. *Mynd*, 1 Anstr. 112.

(*d*) *Anon.* 1 P. W. 495.

(*e*) *Walcot* v. *Hallet*, 2 Bro. C. C. 306; *Anon.* 1 P. W. 495.

(*f*) *Noel* v. *Robinson*, 2 Vent. 338; *Coppin* v. *Coppin*, 2 P. W. 296.

(*g*) *Orr* v. *Kaimes*, 2 Ves. 194.

in no case are legatees, unless compelling payment, obliged to give security to refund (*h*). If a legacy be erroneously paid, the legatee, in refunding, will not be charged with interest; unless there is another fund in court to which the person refunding is entitled, in which case interest will, it should seem, be allowed (*i*). And where a bequest is given to one, to be defeated on a condition that is too remote, or on an event which may not happen within the period prescribed against perpetuities, the legacy will be ordered to be paid to the legatee, and without security to refund (*k*). And where there is an appeal to the House of Lords, against a decree in favour of a legatee, the legatee will be entitled to receive his legacy, on giving security to refund in case of a decision against him (*l*).

(*h*) *Anon.* 1 Atk. 491.

(*i*) *Gittins* v. *Steele*, 1 Swanst. 24; S. C. 200.

(*k*) *Gray* v. *Fawkes*, 18 Ves. 131.

(*l*) *Way* v. *Foy*, 18 Ves. 454.

## CHAP. IV.

### *Of Legatees Remedy.*

No action lies against an executor to recover a legacy, until his assent or promise; after which, trover or assumpsit may be maintained against him (*a*). Equity will not relieve against damages at law (*b*); and no suit can be maintained against an executor before probate (*c*), unless the legacy be charged solely on real estate; for which purpose probate is unnecessary, the probate having reference only to the personal estate (*d*). After an executor has admitted assets, a bill may be filed against him in equity (*e*). Where *A*, a testator, by will bequeathed several legacies, and made *B*, the defendant, executor, who refused to prove, but took out letters of administration; a bill filed for discovery was not stayed, because the administration was litigated (*f*). It is observable,

(*a*) *Ewer* v. *Jones*, 2 Lord Raym. 934; *Williams* v. *Lee*, 3 Atk. 223; *Deeks* v. *Strutt*, 5 Term Rep. 690; *Doe* d. *Say and Sele* v. *Guy*, 3 East, 120.

(*b*) *Ibid.*

(*c*) *Tucker* v. *Phipps*, 3 Atk. 359, n. 1.

(*d*) *Ibid.*

(*e*) *Day* v. *Trigg*, 1 P. W. 287.

(*f*) *Wright* v. *Blicke*, 1 Vent. 106.

that executors are liable for the neglect or devastavit occasioned by their agents, or through their own negligence (*g*). However, where a testator bequeathed the interest of a sum to a married woman for life, with power to her of appointing the principal, the executors applied part of the principal to the benefit of the wife, she then appointed the whole to her husband, and his bill against the executors for devastavit was discharged, as he was bound to provide for his wife (*h*). Wherever an executor pays interest from time to time to a legatee, it is proof of assets; though one payment is not, it is said, sufficient (*i*). An admission of assets to one of several legatees, is an admission to all (*k*): and if an executor retain a legacy, such value as it would have brought at the time of payment or transfer, shall be recovered against him (*l*). So a payment of one legacy raises a presumption of assets sufficient to pay all legacies; and equity will oblige the executor, if solvent, to pay all the other legatees in full, and will not countenance a bill against

(*g*) *Hardwick* v. *Mynd*, 1 Anstr. 109; *Vingrass* v. *Binfield*, 3 Mad. 62.

(*h*) *Randal* v. *Hearle*, 2 Anstr. 360.

(*i*) *Corporation of Clergymen's Sons* v. *Swainston*, 1 Ves. 76.

(*k*) *Cook* v. *Martin*, 2 Atk. 3.

(*l*) *Morley* v. *Bird*, 3 Ves. 628; *Vingrass* v. *Binfield*, 3 Mad. 62.

the legatees paid to refund (*m*). On a bill against an executor for account, he shall be directed to pay the balance of the testator's assets into court (*n*). If an executor suppresses a will, yet the legatee will be entitled, though the will has never been proved (*o*). And if an executor be insolvent, and a sufficient case is made out, equity will restrain him, and appoint a receiver of the testator's assets in his place (*p*). So if he becomes bankrupt, and wastes the assets of his testator, the legatees may come in, under the bankruptcy, to the full extent of the value of the fund wasted (*q*). It is observable, that the executor has most complete power over the personalty of his testator, and if he misapplies it, the legatees cannot, except in case of fraud, follow the effects so disposed, even though specifically given to a legatee (*r*). Paying money, therefore, to executors, even on goods pledged, is not, though paying money to other persons for the

(*m*) *Orr* v. *Kaimes*, 2 Ves. 194.

(*n*) *Curgenween* v. *Peters*, 3 Anstr. 751.

(*o*) *Tucker* v. *Philips*, 3 Atk. 361.

(*p*) *Utterson* v. *Mair*, 2 Ves. J. 98.

(*q*) *Ex parte Shakeshaft*, 3 Bro. C. C. 197.

(*r*) *Lord Mead* v. *Drummond*, 14 Ves. 361; S. C. affirmed, 17 Ves. 153, 170; *Keane* v. *Roberts*, 4 Madd. 330, 353.

private purpose of executors is, considered evidence of fraud (*s*). Where a testator gave several legacies, and made *B.* his executor and residuary legatee, and *B.* received all the assets, and bought land with the money, and bought likewise an equity of redemption of an estate, on which the testator had a mortgage, and died (*t*): on a bill brought by the legatees against the administrator and heir-at-law of *B*, to be paid their legacies out of the real and personal estate, the Lord Chancellor, referring to the doctrine of money, as not having any ear mark, ordered an inquiry; stating, that if it should plainly appear that the assets had been so laid out, they ought to be restored to the personal estate of the testator: and it was decided, that the equity of redemption should be considered assets of the testator, and liable to the legacies.

(*s*) *Hardwick* v. *Mynd*, 1 Anstr. 113; *Hill* v. *Simpson*, 7 Ves. 152; *Kean* v. *Roberts*, *ante*; *M'Leod* v. *Drummond*, 17 Ves. 172.

(*t*) *Ryall* v. *Ryall*, 1 Atk. 59.

## CHAP. V.

### *Of Security to Legatees.*

A LEGATEE is entitled to an appropriation of part of the personal estate of the testator, in order to secure his legacy (*a*); but an executor cannot be advised to make an appropriation without a decree, except in the three cents, since, in case of other appropriated funds proving deficient, the executor will be liable for the deficiency (*b*): and even under an order of the court for an appropriation, any advantage accruing to the fund appropriated will belong to the persons entitled to the principal (*c*). If an appropriation be made in the three per cents, and the stocks fall, the legatee, though an infant, will be bound (*d*); but unless this fund, which is the fund of the court, be chosen, the executor will be liable on a fall (*e*).

(*a*) *Green* v. *Pigot*, 1 Bro. C. C. 103; *Terrand* v. *Prentice*, Ambl. 275; *Batten* v. *Earnley*, 2 P. W. 163; *Whopham* v. *Wingfield*, 4 Ves. 630; *Sitwell* v. *Bernard*, 6 Ves. 543.

(*b*) *Hutchinson* v. *Hammond*, 3 Bro. C. C. 128.

(*c*) *Webb* v. *Webb*, Dick. 746; *Burgess* v. *Robinson*, 3 Meriv. 9.

(*d*) *Champion's Case*, cited 3 Bro. C. C. 147; *Howe* v. *Lord Dartmouth*, 7 Ves. 150.

(*e*) *Cooper* v. *Douglas*, 2 Bro. C. C. 231.

In a late case (*f*), where a testator directed his executors to sell his personal estate, and to invest the produce thereof in the funds, and out of the dividends to pay an annuity of 200*l.* to his widow during her life, and to divide the residue of the dividends amongst his nephews and nieces during his widow's life, and on her decease to transfer the principal of the funds to his nephews and nieces living at her decease; by a decree of the court, 2,000*l.* Navy five per cents (with other funds) were transferred into the name of the Accountant-General of the court, and the interest of the sum of 4,000*l.* Navy five per cents was ordered to be applied in discharge of the annuity: on a conversion of the sum of 2,000*l.* Navy five per cents into 4,200 New four per cents, in pursuance of the statute of 3 Geo. 4, c. 9, a deficiency arising in the dividends of the sum appropriated to answer the annuity, such deficiency was ordered to be made up from other funds in court, since the appropriation was the act of the court, and because the annuity was charged on the general residuary estate. The same doctrine of appropriation holds, notwithstanding the legacy is

(*f*) *Davies* v. *Wattier*, 1 Sim. & Stuart, 463.

contingent (*g*), and payable at a future day; and notwithstanding the executor is the legatee for life of the specific fund; but not if he be absolutely and beneficially the residuary legatee (*h*): though, according to other cases (*i*), where *A.* is tenant for life, an inventory only, and not security, will be ordered, for the benefit of the remainder-man; and this is now the prevailing practice. Assignees for valuable consideration, are entitled to the same equity (*k*). Security also has been ordered to be given for an annuity payable out of the residue of personal estate (*l*): if, however, the testator has entrusted a hand, the court will not require security without some breach, or tendency to a breach of trust (*m*). Where legacies were charged on real estate, several of which became payable, the estate was decreed to be sold; the legatees entitled in præsenti were ordered to be

(*g*) *Philips* v. *Annesley*, 2 Atk. 58; *Heath* v. *Perry*, 3 Atk. 203, n. 1; *Johnston* v. *Mills*, 1 Ves. J. 283; *Studholme* v. *Hodson*, 3 P. W. 304; *Edgell* v. *Haywood*, 3 Atk. 352; *Gawler* v. *Standerwicke*, 2 Cox, 15.

(*h*) *Palmer* v. *Maysent*, Dick. 70; Ib. 351, 520, 568.

(*i*) *Leech* v. *Bennett*, 1 Atk. 470; 2 Atk. 321; *Slanning* v. *Style*, 3 P. W. 335.

(*k*) *Supra*, n. (*g*).

(*l*) *Drinkwater* v. *Whipham*, cited 3 Bro. C. C. 259.

(*m*) *Slanning* v. *Style*, 3 P. W. 335; *Hall* v. *Hoddesdon*, 2 P. W. 162.

paid, and part of the produce was directed to be appropriated to answer legacies of infants; and if the fund appropriated should prove deficient, the charge was to continue on the estate (*n*). When a contingent interest is to be raised out of real estate, the court will not order an appropriation, because the legacy may never be payable (*o*): and where a bequest was to an executrix, who declared herself a trustee of the legacy for another, and covenanted to pay it; on the executrix's death, her brother took out letters of administration to her and her testator, and gave the usual bonds; and it was held that the legatees might take advantage of these bonds, and follow the real estate of the administrator de bonis non of the testator (*p*). Between tenants for life and those in remainder, in things which are depreciating or capable of immediate sale, though future in enjoyment, the property must be valued, and the tenant for life is held to be entitled to the interest in such valuation for his life (*q*). Where, however, a life interest in stock was given to *A*, with a limitation over to *B*, with

(*n*) *Dickenson* v. *Dickenson*, 3 Bro. C. C. 20.

(*o*) *Gawler* v. *Standerwicke*, 2 Cox, 15.

(*p*) *Ashley* v. *Baillie*, 2 Ves. 368.

(*q*) *Howe* v. *Earl Dartmouth*, 7 Ves. 137; *Fearns* v. *Young*, 9 Ves. 547.

the usual clause to trustees to vary the securities of the money invested in stock, &c.; as between the tenant for life and those ultimately entitled, there is not any equity to have the fund changed, but they must take the fund as it is left at the testator's death (*r*). As between a residuary legatee and legatees of certain sums, to be paid after the decease of *A.*, the court will not allow the security of the legatees in gross, to be decreased by an appropriation of part of the fund, in order to enable the residuary legatee to acquire the immediate enjoyment of his legacy, since the fund appropriated may deteriorate in value, to the prejudice of the legatees entitled after the death of *A.* (*s*). And an appropriation to answer the intent of the testator, will be directed for the benefit of future and contingent legatees, even though the whole residue, by that means, should be required (*t*).

(*r*) *Lord* v. *Godferry*, 4 Mad. 458.

(*s*) *Soundy* v. *Benyon*, 3 Bro. C. C. 257; *Breton* v. *Cliffden*, 1 Sim. & Stuart, 363.

(*t*) *Defflis* v. *Goldschmidt*, 1 Meriv. 417.

## CHAP. VI.

## *Of Marshalling.*

WHENEVER a deficiency is created in the personal estate, by the payment of specialty debts, (or such debts as affect the real estate, though primarily payable out of the personalty) equity interposes, and directs that legatees, who have only the personal fund to resort to, shall stand in the place of those creditors who might have been paid out of the realty (*a*); or in other words, if *A.* has a charge which may be paid out of two funds, and *B.* has a charge which is payable out of one of those funds only, if *A.* is paid out of the latter fund, then *B.* shall stand in *A.*'s place, as a creditor on the other fund, to the amount subtracted from *B.*'s fund, for the purpose of paying *A.* To this doctrine equity leans strongly; in order that all creditors

(*a*) *Forster* v. *Cook*, 3 Bro. C. C. 351; *Burton* v. *Pierrepont*, 2 P. W. 80; *Lacon* v. *Mertins*, 1 Ves. 312; *Hanby* v. *Roberts*, Ambl. 128; *Pearce* v. *Loman*, 3 Ves. 139; *Mogg* v. *Hodges*, 2 Ves. 53; *Arnold* v. *Chapman*, 1 Ves. 110; *Norman* v. *Morrell*, 4 Ves. 770.

may be satisfied (*b*); thus, legatees have been decreed to stand in the place of mortgagees, to the extent they had exhausted the personalty (*c*). Assets are marshalled between legatees under the same will, where part of the legacies are charged on the realty together with the personalty, and some of the legacies are charged only on the personal estate (*d*); and also between legatees under a will and codicil, under similar circumstances (*e*). Between legatees and specific devisees of real estate, there is not, however, any marshalling of assets, whether the legacy be either, a general or a specific legacy (*f*); because the application of this doctrine, in such a case, would defeat the very object of the testator. If leaseholds, however, are specifically bequeathed, and land is also devised, which is subject to a mortgage, if the general personal estate be exhausted, the devisee of the realty must take the land devised to him cum onere, and shall not call on the legatee of the leaseholds to discharge the mort-

(*b*) *Lacon* v. *Mertins*, 1 Ves. 312.

(*c*) *Forrester* v. *Lord Lee*, Ambl. 174; see, however, *Keeling* v. *Brown*, 5 Ves. 362.

(*d*) *Bligh* v. *Darnley*, 2 P. W. 621.

(*e*) *Masters* v. *Masters*, 1 P. W. 422.

(*f*) *Haslewood* v. *Pope*, 3 P. W. 323; *Clifton* v. *Burt*, 1 P. W. 678; *Herne* v. *Meyrick*, 1 P. W. 204; *Forrester* v. *Lee*, Ambl. 172; *Aldrich* v. *Cooper*, 8 Ves. 396.

gage debt (*g*). So general legatees may come on the real estate, where the real estate is primarily charged with debts, or where a mortgage debt is satisfied out of the personal estate, to which the real estate devised was primarily liable between the heir and executor (*h*); and as against a residuary devisee of real estate charged with debts, the assets shall be marshalled, such devisee being entitled to the residue only after all charges and incumbrances are satisfied (*i*). If the paraphernalia of a married woman be applied in payment of debts, (to which they are liable,) notwithstanding a devise of land charged with the payment of debts, the widow shall have compensation out of real estate which descends (*j*). And if the paraphernalia of the testator's wife are applied in payment of debts, she will be entitled to come in on the trust of a term charged with debts, to the extent of the value of such paraphernalia; and to such extent, she is entitled to priority over legatees (*k*). And where *A.* contracted

(*g*) *O'Neal* v. *Mead*, 1 P. W. 694.

(*h*) *Bonner* v. *Bonner*, 13 Ves. 379; *Aldrich* v. *Cooper*, 8 Ves. 397; *Topping* v. *Topping*, 1 P. W. 730; *Haslewood* v. *Pope*, 3 P. W. 323.

(*i*) *Hanby* v. *Roberts*, Ambl. 128; *Chaplin* v. *Chaplin*, 3 P. W. 368, n.

(*j*) *Probert* v. *Clifford*, Ambl. 6.

(*k*) *Incledon* v. *Northcote*, 3 Atk. 438; *Aldrich* v. *Cooper*, 8 Ves. 397.

for an estate, and paid part of the purchase money, and died, leaving *B.* his devisee and executor; on a devastavit by *B.* of the personalty, the real estate was held liable to bear the charge, to give effect to a legacy (*l*): and so, it is said, in case of a devastavit by a trustee (*m*), who is likewise the devisee of real estate charged with legacies. This doctrine is applicable only where the legatee has an established claim solely and distinctly on the personal estate, and never takes place where the legacy fails to affect the real estate, in consequence of an event which happens subsequent to the death of the testator (*n*). It is observable, that between real and personal representatives there is not any such equity; where, therefore, an estate was devised to be sold, and converted into money, to be applied in payment of several legacies, the legacies were answered out of the personalty; and on a bill, by the next of kin, to have the estate sold, and to stand in the place of the legatees to the extent they had exhausted the personal estate, the bill was dismissed, under

(*l*) *Pollexfen* v. *Moore*, 3 Atk. 272; *Austen* v. *Halsey*, 6 Ves. 484.

(*m*) *Hardwick* v. *Mynd*, 1 Anstr. 114.

(*n*) *Prose* v. *Abingdon*, cited in *Pearse* v. *Loman*, 3 Ves. 139; *Duke of Chandos* v. *Lord Talbot*, 2 P. W. 612.

the general rule, that the heir shall take all the real estate, or the produce of the real estate, that is not, for a defined and specific purpose, given away by the will (*o*). Even where a personal charge merged in the realty, equity would not raise it in favour of an administrator, because the funds must be taken as they are found (*p*). Nor can assets be marshalled in favour of a charity (*q*), since a devise of the produce of land to a charity is, by law, void; as is also a bequest of money, to be invested in land, in favour of a charity (*r*): Lord Hardwicke, however, approved of marshalling assets in favour of a charity (*s*). A residuary legatee of personalty is not entitled to this equitable doctrine, because, unless the personal estate be sufficient for the purposes of the will, there will not, in fact, be any residue, and consequently the residuary bequest must be nugatory (*t*).

(*o*) *Hale* v. *Cox*, 3 Bro. C. C. 323; *Chitty* v. *Parker*, 2 Ves. J. 271.

(*p*) *Lord Compton* v. *Crenden*, 2 Ves. J. 265; *Lord* v. *Godferry*, 4 Madd. 458; *Choate* v. *Yates*, 1 Jac. & Walk. 102.

(*q*) *Waller* v. *Childs*, Ambl. 526; *Attorney-General* v. *Caldwell*, Ambl. 635.

(*r*) *Mogg* v. *Hodges*, 2 Ves. 53; *Forster* v. *Blagden*, Ambl. 704; *Hollyard* v. *Taylor*, Ambl. 713; 3 Bro. C. C. 379; *Makeham* v. *Hooper*, 4 Bro. C. C. 150.

(*s*) *Attorney-General* v. *Graves*, Ambl. 158.

(*t*) *Arnold* v. *Chapman*, 1 Ves. 110; *Purse* v. *Snaplin*, 1 Atk. 418; *Choates* v. *Yates*, 1 Jac. & Walk. 102.

## CHAP. VII.

### *Parol Evidence.*

PAROL Evidence, though much disapproved by many judges, and where admitted generally discountenanced, is still allowed by courts both of law and of equity, where there is a latent ambiguity (*a*); and also in cases of fraud, or mistake, or to prove identity, or collateral satisfaction (*b*); but not to explain a written paper, or a patent ambiguity (*c*). "Parol evidence, ought, says Lord Eldon (*d*), to be admitted in a latent, though not in a patent ambiguity; and it ought to be admitted to rebut equities founded on presumption, and perhaps to support a presumption, to oust an implication, and to explain what is parcel of premises granted or conveyed; though parol evidence is not allowed to show a testator

(*a*) *Baugh* v. *Read*, 1 Ves. 527; *Nourse* v. *Finch*, 4 Bro. C. C. 248; *Careless* v. *Careless*, 1 Meriv. 390.

(*b*) *Nourse* v. *Finch*, 1 Ves. 357; S. C. 4 Bro. C. C. 248; *Horney* v. *Finch*, 2 Ves. 79; *Blinkhorn* v. *Feast*, 2 Ves. 28.

(*c*) *Delmare* v. *Robello*, 1 Ves. J. 413; *Nourse* v. *Finch*, *ante*; *Hampshire* v. *Pierce*, 2 Ves. 217.

(*d*) *Druce* v. *Denison*, 6 Ves. 397; see also *Pole* v. *Lord Somers*, 6 Ves. 323.

meant another person's estate; though a paper annexed to a will, and written on the same day by the testator, was allowed in evidence for this last purpose." It has been admitted to show an executor was entitled to the residue, notwithstanding he took a legacy by the will; and in that case the evidence went to show what the testator considered he had actually done in favour of his executor (*e*); and evidence was admitted that he had stated, "that all he had was to go to his executor, and he had settled his affairs." Again, parol evidence has been admitted where a mistake has been made in the name of a legatee, and there is not any one to answer the description (*f*); and where there were two of the same name (*g*); so this evidence has been admitted on a bequest by a bachelor, to prove who had acquired the reputation of being his children (*h*); it has been also admitted, to show that a legacy was intended to be discharged from debts owing to the testator by the legatee (*i*), the testa-

(*e*) *Clennel* v. *Lewthwaite*, 2 Ves. 472; S. C. 2 Ves. 650; *Petit* v. *Smith*, 1 P. W. 9; *Rutland* v. *Rutland*, 2 P. W. 203; *Dick* v. *Lambert*, 4 Ves. 730; *Langham* v. *Sanford*, 2 Meriv. 17.

(*f*) *Goodinger* v. *Goodinger*, 1 Ves. 231; *Smith* v. *Coney*, 6 Ves. 43, and cases cited.

(*g*) *Careless* v. *Careless*, 1 Meriv. 390.

(*h*) *Beachcroft* v. *Beachcroft*, 1 Madd. 430.

(*i*) *Eden* v. *Smyth*, 5 Ves. 341.

tor's son in law; in this case, memoranda, account-books, and letters were admitted in evidence, to prove that the testator meant to discharge *A.* from such debts, and to confer a benefit on him by the bequest (*k*). So parol evidence was admitted, where the name of a mother was mentioned by mistake for her daughter's name, and the mother acknowledged the mistake (*l*). Again, parol evidence has been admitted where the Christian name of a legatee was mistaken; as where a testator had only one brother at the date of his will, called Samuel, and he gave to his brother by the name of Edward, who had been dead some years previous to the date of the will (*m*). So in a bequest to my son *A*, where the testator had two sons of that name (*n*), parol evidence has been admitted. Again, where the initials only of a legatee's name were written (*o*), this evidence has been admitted. And where the will is uncertain, as on a bequest to my four children, where the testator has six, four by *A*, and two by *B*, the like evidence has been admitted; though, under a general bequest to

(*k*) *Eden* v. *Smyth*, 5 Ves. 355.

(*l*) *Clarke* v. *Norris*, 3 Ves. 361.

(*m*) *Parsons* v. *Parsons*, 1 Ves. J. 266.

(*n*) *Cheney's Case*, 5 Coke, 68.

(*o*) *Abbot* v. *Massie*, 3 Ves. 149.

children, such evidence would not be received (*p*). The same evidence is admissible to repel an equity, which is itself only a presumption (*q*): but it is not admissible to rebut a presumption arising from a rule of law, or against the express words of a will (*r*). It has been admitted to prove, that a sum paid by a father was intended to be an advancement, where, by his will, the father directed his executor to lay out 300*l.* in putting his son out an apprentice (*s*). It has also been received to ascertain the amount of a residue (*t*): but it is not admissible either to add to or subtract from a will (*u*); as that a legacy to *A.* was intended to be given by the testator, because the admission of this evidence in such a case would be, in effect, of greater mischief than a nuncupative will. Nor is it admissible to prove an intention to exercise a power, because equity cannot relieve against the non-execution of a power, and the evidence would therefore be useless (*x*). And this evidence is

(*p*) *Hampshire* v. *Pierce*, 2 Ves. 217.

(*q*) *Granville* v. *Beaufort*, 1 P. W. 114, n. 3.

(*r*) *Hurst* v. *Beach*, 5 Mad. 361.

(*s*) *Rosewell* v. *Bennett*, 3 Atk. 78.

(*t*) *Nourse* v. *Finch*, 4 Bro. C. C. 245.

(*u*) *Whitton* v. *Russell*, 1 Atk. 448.

(*x*) *Molton* v. *Hutchinson*, 1 Atk. 559.

admitted to prove such conversations only, as transpired at the time of the testator's making his will (*y*); but parol evidence, if doubtful or contradictory, must be laid aside (*z*).

(*y*) *Nourse* v. *Finch*, 4 Bro. C. C. 245; S. C. 1 Ves. 344; *Langham* v. *Sandford*, 2 Meriv. 28.

(*z*) *Ibid.*

# PART IV.

WE now come to the means by which Legacies may be defeated: partially or totally. These means are—

1st, By revocation;
2d, By ademption;
3d, By lapse;
4th, By satisfaction;
5th, By waiver;
6th, By election; and
7th, By abatement, where there is a deficiency of assets.

## CHAP. I.

### *Of Revocation.*

REVOCATIONS are either express or implied. By the stat. 29 Car. 2, c. 3, s. 6, no devise of land can be revoked, except by will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or

some other person in his presence, and by his sanction and consent; but the same shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator, or by his directions; or unless the same be altered by some other will or codicil in writing, or some other writing of the devisor, signed in the presence of three or four witnesses, declaring the same (*a*). And a will, to revoke a prior will, must be found to be different to, or inconsistent with, the will which such subsequent will revokes, as well as executed in conformity to the statute (*b*).

## *Of Express Revocation.*

A WILL or testament may be revoked by cancellation, or by its destruction by the devisor or testator (*c*), if done animo revocandi (*d*); but cancelling one part of a will does not, without an apparent intention to revoke the

(*a*) *Ellis* v. *Smith*, 1 Ves. J. 11; *Ex parte Earl of Ilchester*, 7 Ves. 372, 374, 379.

(*b*) Swinb. 30, *et seq.*; *Harwood* v. *Goodright*, Cowp. 93; S. C. 7 Bro. Parl. C. 344; P. Shep. T. 412; Pow. Devises, 537, *et seq.*; *Ex parte Earl of Ilchester*, 7 Ves. 370, 379.

(*c*) *Mence* v. *Mence*, 18 Ves. 350; *Harwood* v. *Goodright*, Cowp. 92; *Moore* d. *Medcalfe* v. *Moore*, 1 Philli. Rep. 401.

(*d*) *Johnston* v. *Johnston*, 1 Philli. Rep. 466; *Buttenham* v. *Gilbert*, Cowp. 52; *Winsor* v. *Pratt*, 2 Brod. & Bing. 656; Swinb. 82.

whole will, operate as a revocation, further than the cancellation extends; though any further devise, in substitution of the cancelled devise, will be inoperative, without a republication of the will (*e*). It is observable, that the cancellation of a will, is a revocation to a duplicate of the same will (*f*). The law on the subject of cancellation is thus stated by C. J. Dallas (*g*): "The effect of cancelling a will depends on the validity of the second will, and ought to be taken as one act, done at the same time; so that if the second will is not valid, the cancelling the first, being dependant thereon, ought to be looked on as null and inoperative (*h*)." And the cancellation to revoke a will must be completed, so that tearing a will in part, and desisting by entreaty, &c. from completing his intended cancellation, will not be sufficient to revoke a will; however, the fact of the cancellation being complete or not must be decided by a jury (*i*).

(*e*) *Onyons* v. *Tyrer*, 1 P. W. 346; *Sutton* v. *Sutton*, Cowp. 814; S. P. *Short* d. *Gastrell* v. *Smith*, 4 East, 428; *Winsor* v. *Pratt*, 2 Bro. & Bing. 656.

(*f*) *Burtenshaw* v. *Gilbert*, Cowp. 54.

(*g*) *Winsor* v. *Pratt*, 2 Bro. & Bing. 656.

(*h*) Swinb. 52; *vide* also *Burtenshaw* v. *Gilbert*, Cowp. 53; *Harwood* v. *Goodright*, Cowp. 92.

(*i*) *Doe* v. *Perkins*, 3 Barn. & Ald. 490.

## *Of Implied Revocation.*

THE stat. 32 Hen. 8, c. 1, empowered those only who had or should have estates to devise the same; therefore, if a person have an estate, and devise it, and subsequently alter the estate, so as to make it, in contemplation of law, a new acquisition, it will not pass by the will, unless republished. Therefore, a devise of real estate may be revoked by a change in the fee, or entire estate of the testator, viz. by parting with the fee, notwithstanding the testator take a re-conveyance of the same estate (*k*); and this is the case, though the disposition be incomplete by reason of want of livery, &c. (*l*). And even where a person contracted to purchase the fee of certain property, and then devised the estate so contracted for; and the uses in the convey-

(*k*) *Putbury* v. *Trevilian*, 1 Roll. Abr. 616; Dyer, 143; *Beard* v. *Beard*, 2 Atk. 72; *Ex parte Earl of Ilchester*, 7 Ves. 373; *Sparrow* v. *Hardcastle*, 3 Atk. 802; *Holford* v. *Otway*, 7 Term Rep. 399; *Cave* v. *Holford*, 3 Ves. 662; *Vawser* v. *Jefferys*, 2 Swanst. 274.

(*l*) *Burgoyne* v. *Fox*, 1 Atk. 576; *Vawser* v. *Jefferys*, *ante*; *Ex parte Earl of Ilchester*, 7 Ves. 370.

ance, executed subsequent to such will, were such as to bar dower; it was held to be a revocation of the devise of such estate, which was previously good in equity (*m*); and for this reason, a contract to sell is, in equity, a revocation (*n*), if the contract be such as the court of equity would decree to be specifically performed (*nn*). So a fine (*o*) or recovery (*p*), which disturbs the seisin, will operate as a revocation of a will. It is observable, that a surrender of copyholds will not operate as a revocation of a will of those copyholds surrendered to the use of a will (*q*). A revocation may be partial, viz. for a partial interest, or for a particular purpose, as securing money (*r*): and the latter rule applies in equity, though the whole fee be parted with to the devisee under the will, if simply for the purpose of securing money,

(*m*) *Knollys* v. *Alcock*, 7 Ves. 564; *Bennet* v. *Tankerville*, 19 Ves. 178; *Rawlins* v. *Burges*, 2 Ves. & B. 385; *Ward* v. *Moore*, 4 Mad. 368.

(*n*) *Rawlins* v. *Burges*, 2 Ves. & B. 385.

(*nn*) *Knollys* v. *Alcock*, 7 Ves. 558.

(*o*) *Doe* v. *Dilnot*, 2 New Rep. 401.

(*p*) *Bennett* v. *Wade*, 2 Atk. 325; *Sparrow* v. *Hardcastle*, 3 Atk. 803; *Manwood* v. *Turner*, 3 P. W. 165; *Vawser* v. *Jefferys*, 2 Swanst. 273.

(*q*) *Vawser* v. *Jefferys*, 3 Barn. & Ald. 462; S. C. 2 Swanst. 268.

(*r*) *Harkness* v. *Bayley*, Prec. Ch. 515; *Parson* v. *Freeman*, 3 Atk. 741; *Harmond* v. *Oglander*, 6 Ves. 199; S. C. 8 Ves. 106.

and without any intention of otherwise altering the estate (*s*). So a codicil may be a revocation of a will, conditionally only, as in case the testator should die before he joined his wife, and this condition will be construed strictly (*t*). Taking a conveyance of the legal fee, where the testator had the equitable fee at the time of devising the same (*u*); or making a partition simply, does not amount to a revocation (*v*).

A will may be revoked impliedly also, by a change in circumstances; as by the marriage of the testator, and birth of a child, subsequent to the date of his will (*a*); and notwithstanding the testator has children by a former marriage (*b*). So marriage, and the pregnancy of the wife, with the knowledge of the husband, and the subsequent birth of a posthumous child after the death of the father, will revoke a will

(*s*) *Vawser* v. *Jefferys*, 2 Swanst. 273; over-ruling *Harkness* v. *Bayley*, Prec. in Chan. 514.

(*t*) *Sinclair* v. *Hone*, 6 Ves. 608.

(*u*) Roll. Abr. 616, pl. 3; *Ward* v. *Moore*, 4 Mad. 361.

(*v*) *Risley* v. *Baltinglas*, C. T. Raym. 240; *Rawlins* v. *Burges*, 2 Ves. & B. 385; *Knollys* v. *Alcock*, 7 Ves. 564.

(*a*) P. Shep. Touch. 410; Swinb. 565; *Cook* v. *Oakley*, 1 P. W. 304; *Sheath* v. *York*, 1 Ves. & B. 397; *Wellington* v. *Wellington*, Burr. 2165; *Johnston* v. *Johnston*, 1 Phill. Rep. 496.

(*b*) *Holloway* v. *Clarke*, 1 Phill. Rep. 339.

equally as well as where the child is born during the parent's lifetime (*c*): however, a will made subsequent to a marriage will not be revoked by the birth of a posthumous child, though the parent was, at his decease, ignorant of his wife's being ensient (*d*); but such presumption of revocation is raised only where there is a complete disposition, entirely disinheriting the subsequent born children (*e*); and it will be rebutted, if the testator does any act, subsequent to his marriage, inconsistent with the presumption of revocation, as by referring to the will, as existing and effectual for the purpose for which it was made (*f*). Such presumption of revocation is, also, rebutted, if a settlement be made on the second marriage (*g*); or if the children of such marriage are provided for by the will (*h*). A bequest is not revoked, by the testator marrying a person who is a legatee or devisee under his will (*i*). Marriage

(*c*) *Doe* v. *Lancashire*, 5 Term Rep. 49.

(*d*) *Doe* v. *Barford*, 4 Maul. & Selw. 11.

(*e*) *Sheppard* v. *Sheppard*, Dougl. 38, n. 10; *Kennebel* v. *Scrafton*, 2 East, 541.

(*f*) *Brady* v. *Cubit*, 1 Dougl. 31.

(*g*) *Ex parte Earl of Ilchester*, 7 Ves. 348.

(*h*) *Kennebel* v. *Scrafton*, 2 East, 530; *Ex parte Earl of Ilchester*, *ante*.

(*i*) *Ewbank* v. *Halliwell*, 2 Bro. C. C. 220.

alone is a revocation of a woman's will (*k*); and republication, even though she survive her husband, is necessary after she becomes sole, to give effect to the same will (*l*). But where *A.* and *B*, two sisters, mutually made wills, each in favour of the other, in the event of death; and one married, it was held the will of the other was not revoked (*m*). Again, where a bequest was in the nature of an appointment of money, over which the testatrix *A.* had a power of appointment, to trustees in trust for *A.*'s residuary legatee, after mentioned in her will, and *A.* appointed her son *B.* residuary legatee; by a codicil, the testatrix revoked her residuary bequest, and appointed *B.* and *C.* her residuary legatees, as tenants in common; it was held, that the revocation did not extend to the property appointed, and that *B*, being the person designated in the will as residuary legatee, should be solely entitled to the money over which the testatrix had a power of appointment (*n*); since money, subject to a power,

(*k*) *Doe* v. *Staple*, 2 Term Rep. 695; P. Shep. Touch. 410; Swinb. 145.

(*l*) *Forse* v. *Hembling*, 4 Co. Rep. 60.

(*m*) *Hinchley* v. *Simmons*, 4 Ves. 165.

(*n*) *Roach* v. *Haynes*, 6 Ves. 156, affirmed 8 Ves. 584.

will not pass simply by the bequest of a residue (*q*).

By the 29th Car. 2, c. 3, s. 22, no testament concerning personal estate can be repealed, nor any clause or bequest therein altered or changed, by any words, or will by word of mouth only, except the same be, in the testator's lifetime, committed to writing, and after the writing thereof read to the testator, and allowed by him, and proved to be so done by three witnesses at least. A will of personal estate may be revoked also by cancellation, or by burning, tearing, or obliterating the same by the testator, or by some other person by his sanction, and at his request. A revocation may also, as to personal estate, be by an incomplete instrument, provided the testator, by such instrument, discloses an intention to revoke (*r*): but a voluntary gift, to take effect after the testator's death, by an instrument in the form of a deed, will not be revoked by a subsequent will, in favour of volunteers, though the deed be found in the possession of the donor (*s*). Indeed, all devises and bequests are revo-

(*q*) *Buckland* v. *Burton*, 2 Black. 136; *Andrews* v. *Emmot*, 3 Bro. C. C. 301.

(*r*) *Jackson* v. *Jackson*, 2 Cox Rep. 35; *Attorney-General* v. *Ward*, 3 Ves. 327.

(*s*) *Boughton* v. *Boughton*, 1 Atk. 625.

cable by a testator, even by his deed (*t*); since a will is complete only from the testator's death; and such revocation may be made, if the legacy be charged on the personalty, or on realty as the auxiliary fund, by a written paper unattested (*u*); but equity does not favour revocations contrary to the intention of the testator (*x*). A bequest, if revoked by mistake in fact, will, on the intention, be supported; as where a bequest was to *A.* and *B*, and the testator revoked the bequest, stating that *A.* and B. were dead, which was not the fact; the court held that the bequest should be supported (*y*). And a legacy revoked by a codicil, and by interlineation, may be revived by cancellation of the codicil, though the interlineation still remain (*z*). By construction, a revocation may be confined merely to the residue, because other specified articles, given to the legatee by the same clause, are deemed specific (*a*). It seems doubtful, where the revocation, by a

(*t*) *Lisle* v. *Lisle*, 1 Bro. C. C. 533.

(*u*) *Wyndham* v. *Chetwynd*, 1 Burr. 423; *Attorney-General* v. *Ward*, 3 Ves. J. 331; *Skrymsker* v. *Northcote*, 1 Swanst. 567.

(*x*) *Carte* v. *Carte*, 3 Atk. 179.

(*y*) *Campbell* v. *French*, 3 Ves. J. 321.

(*z*) *Parker* v. *Ash*, 1 Vern. 256; *Winsor* v. *Pratt*, 2 Bro. & Bing. 656.

(*a*) *Clarke* v. *Butler*, 1 Meriv. 307.

codicil, is of a legacy mistaken in amount, whether the legatee will forfeit his legacy or no (*b*). A will though revoked may be revived, and rendered effectual, by republication by a codicil (*c*), provided such codicil be, as to lands, duly attested to pass real estate (*d*), even though the codicil relate to personal estate only (*e*); and the will may, for some purposes, be read as made at the date of republication (*f*). A will, intended to be revoked by a subsequent will, will be established, if such subsequent will is ineffectual, or is cancelled (*g*); but cancellation of such second will, will not of itself be sufficient to revive a will expressly revoked or cancelled (*h*); the original will, to be rendered effectual, must be republished. It is doubtful whether a will, revoked by a contract, would be revived by an abandonment of the contract, in the testator's lifetime, without a republication of the will (*i*): if, however, as

(*b*) *Lord Carrington* v. *Payne*, 5 Ves. 423.

(*c*) *Strathmore* v. *Bowes*, 7 Term Rep. 482.

(*d*) *Gallini* v. *Noble*, 3 Meriv. 691; *Perkins* v. *Micklethwaite*, 1 P. W. 275.

(*e*) *Barnes* v. *Crowe*, 1 Ves. J. 486.

(*f*) *Carleton* v. *Griffiths*, 1 Burr. 554.

(*g*) *Winsor* v. *Pratt*, 2 Bro. & Bing. 656; *Goodright* v. *Glazier*, 4 Burr. 2514.

(*h*) P. Shep. Touch. 413; *Stride* v. *Cooper*, 1 Phill. Rep. 336; Pow. Dev. 551, 553; Watk. Prin. 4th edit. 245.

(*i*) *Knollys* v. *Alcock*, 7 Ves. 566; *Bennett* v. *Lord Tankerville*, 19 Ves. 173.

before observed, the will is revoked by a good and subsisting contract, at the testator's death, no event after the testator's death could revive the will.

## CHAP. II.

## *Of Ademption.*

ADEMPTION is a doctrine confined to specific legacies.

What shall be an ademption of a debt specifically bequeathed, is a point of considerable difficulty, from the variety of decisions. A distinction was formerly made between a voluntary and a compulsory payment (*a*); the better opinion afterwards appeared to be, that such a bequest was not adeemed either by a voluntary or compulsory payment (*b*), without some intention disclosed, that the testator meant to deprive the legatee of the benefit he

(*a*) *Crockat* v. *Crockat*, 2 P. W. 165; *Lawson* v. *Stitch*, 1 Atk. 508, and cases cited n. 2; *Ashburner* v. *M'Guire*, 2 Bro. C. C. 108; *Attorney-General* v. *Pyle*, 1 Atk. 435.

(*b*) *Thomond* v. *Suffolk*, 1 P. W. 464; *Ashton* v. *Ashton*, 3 P. W. 385; *Innes* v. *Johnston*, 4 Ves. 574.

once intended him (*c*). In *Drinkwater* v. *Falconer*, 2 Ves. S. 624, it was decided, that a voluntary payment of a debt, specifically bequeathed, was not any ademption, since the payment did not create any alteration of the testator's intention; nor should a compulsory payment of itself amount to an ademption, as it might be done for the sake of the legatee. The fact to be ascertained is, the intention of the testator in requiring payment: Lord Thurlow thus states the doctrine, "The bequest of part of a debt, or the value of a jewel, is adeemed by payment, or receipt of value by the testator, by reason of the annihilation of the subject, though the same is not an ademption properly so called, the same depending on intention (*d*)." Nor was a bequest of specific bills of exchange, drawn and accepted by the East India Company, adeemed by payment in the usual mode, by the East India Company, their usual course being to pay these bills in rotation (*e*). So it has been held (*f*), that calling in money, due on mortgage, was not an ademption of the

(*c*) *Hambling* v. *Lister*, Ambl. 402; *Attorney-General* v. *Parten*, Ambl. 568.

(*d*) *Badrick* v. *Stevens*, 3 Bro. C. C. 432; *Stanley* v. *Potter*, 2 Cox, 182.

(*e*) *Coleman* v. *Coleman*, 2 Ves. J. 639.

(*f*) *Le Grice* v. *Finch*, 3 Meriv. 50.

bequest of the money so due. Again (*g*), where, on a bequest of interest, due on a sum secured by mortgage, with an averment as to the amount, the testatrix received interest subsequent to her will, to the amount of the sum due at the date of her will; yet, on evidence, it was decided, that the testatrix had received interest due only subsequent to her will, and that the sum bequeathed still being due, and intended by the testatrix to remain due, for answering the purposes of her will, the bequest was not adeemed. Again, where there was a bequest of a particular debt, with a direction, that if the money due, or any part of it should be paid, the legatee should receive so much money as should be equal to the part of the debt paid; a release by the testatrix afterwards, was held not to be an ademption, and the general assets were considered liable (*h*). So under a bequest of a sum of 500*l.* to *A*, viz. 400*l.* due from *B*, and 100*l.* in money; where the testator received part of the money due from *B*, and took a bond for the residue, it was held that this was not an ademption, being merely an appropria-

(*g*) *Graves* v. *Hughes*, 4 Madd. 390; *Hambling* v. *Lister*, Ambl. 401.

(*h*) *Thomond* v. *Lord Suffolk*, 1 P. W. 461, and see note, 464.

tion of a particular fund for payment of the bequest (*i*). This bequest was considered to be a general legacy, payable out of specified funds (*k*). Again, the receipt of dividends on a debt due from a bankrupt, was not held an ademption of the bequest of that particular debt, this act of the testator being an act of necessity (*l*). And a bequest of rent due, has been held not to be adeemed by receipt of the same rent, because it was said by the court the rent might be in danger (*m*); but it has been also held (*n*), that money due on a note of hand, was adeemed by receipt of the same money by the testator, and an appropriation of part thereof to his own use. According to a recent case before the Chancellor (*o*), it is laid down, that "whenever the thing specifically given does not exist at the testator's death, the legacy must fail, unless the fund pointed at was merely the primary fund to pay the legacy, as distinguished from a specific legacy." A specific bequest of stock, is adeemed either in toto or pro tanto by a sale of the whole

(*i*) *Orme* v. *Smith*, 2 Ves. 681.

(*k*) *Saville* v. *Blackett*, 1 P. W. 778; *Ashburner* v. *M'Guire*, 2 Bro. C. C. 108.

(*l*) *Ibid.* 2 Bro. C. C. 108.

(*m*) *Ford* v. *Flemming*, 2 P. W. 470.

(*n*) *Fryer* v. *Morris*, 9 Ves. 360.

(*o*) *Baker* v. *Rayner*, 5 Madd. 217.

or part of it, by the testator (*p*): but such a bequest is not adeemed by a change of the testator's interest from equitable into legal; as by a transfer by trustees, to the testator, of sums in the funds, to which he is equitably entitled (*q*): nor is a similar bequest adeemed, or rather satisfied, by a transfer by the testator in his lifetime, of an equal or greater quantity of stock, into the names of himself, and of the legatee (*r*): it might, it is apprehended, be contended in equity, that the legatee's name was used merely as a trustee for the testator, and that the testator had, in fact, the entire control of the stock in equity. A specific bequest is such as the testator has at the date of his will; and therefore, a specific bequest of stock, which the testator had at the date of his will, cannot, if adeemed, be revived by a purchase of the same quantity of the like stock, after the date of his will, without a codicil confirming such will (*t*); and a legacy

(*p*) *Purse* v. *Snaplin*, 1 Atk. 414; *Barton* v. *Cook*, 5 Ves. 464; *Humphrey* v. *Humphrey*, 2 Cox, 184; *Pist* v. *Camelford*, 3 Bro. C. C. 170; *Sibley* v. *Perry*, 7 Ves. 629.

(*q*) *Dingwell* v. *Askew*, 1 Cox, 427.

(*r*) *Wetherby* v. *Dixon*, Coop. 281.

(*t*) *Carleton* v. *Griffiths*, Burr. 554; *Perkins* v. *Micklethwaite*, 1 P. W. 275; *Coppin* v. *Fernyhough*, 2 Bro. C. C. 297; *Drinkwater* v. *Falconer*, 2 Ves. S. 626; *Lunn* v. *Bank of England*, 15 Ves. 569; *Roome* v. *Roome*, 3 Atk. 180; *Carte* v. *Carte*, ib. 179.

satisfied, will not be revived by republication (*u*). Leaseholds, specifically given, are adeemed by renewal (*x*), even though all the lives were dead previous to such renewal; because the identical lease, which the testator possessed at the date of his will, does not exist at his death (*y*). But this doctrine must be understood of the legal interest, for an equitable interest in a term, is not revoked by the legal owner taking a renewal (*z*). The bequest should therefore be, of such leaseholds as shall belong to me at my death; or, all the interest that I shall have at my death, as distinguished from all my interest, in my leaseholds at *A.* (*a*); if it is wished to avoid this consequence (*b*). An adeemed lease may, however, pass by a codicil made after the renewal, and annexed to, and republishing, the will (*c*); since the will, for

(*u*) *Monck* v. *Monck*, 1 Ball. & B. 304.

(*x*) *Abney* v. *Miller*, 3 Atk. 597; *Carte* v. *Carte*, 3 Atk. 176; *Marwood* v. *Turner*, 3 P. W. 166; *Attorney-General* v. *Downing*, Ambl. 572.

(*y*) *Pierson* v. *Stone*, 1 Atk. 479.

(*z*) *Carte* v. *Carte*, 3 Atk. 176.

(*a*) *Slater* v. *Norton*, 16 Ves. 119.

(*b*) *Hone* v. *Medcraft*, 1 Bro. C. C. 261; *Carte* v. *Carte*, 3 Atk. 176; *Stirling* v. *Liddiard*, 3 Atk. 199; *Wind* v. *Jekyl*, 1 P. W. 574; 16 Ves. 197; though this was formerly doubted in *Burkes* v. *Cook*, Salk. 237.

(*c*) *Coppin* v. *Fernyhough*, 2 Bro. C. C. 296; *Drinkwater* v. *Falconer*, 2 Ves. S. 625; *Crosbie* v. *M'Dowal*, 4 Ves. 616.

this purpose, speaks from the date of its republication (*d*). So a surrender of leaseholds will, though an agreement for a surrender will not, amount to an ademption of a bequest of leasehold (*e*). A bequest of money arising from sale of real estate, is adeemed by the sale of the estate by the testator (*f*). A specific bequest may also be adeemed by conversion, as a gold chain converted into a gold cup (*g*): but the removal of goods, if necessary, is not an ademption of a bequest of goods in a particular place (*h*), or in a ship (*i*). Lastly, specific and general legacies may be adeemed by payment in the testator's lifetime (*k*); but this last ademption falls more properly under the head of Satisfaction, and will be treated of when we come to consider that subject.

(*d*) *Monck* v. *Monck*, 1 Ball. & B. 304.

(*e*) *Rudstone* v. *Anderson*, 2 Ves J. 418; *vide* 16 Ves. 199.

(*f*) *Arnold* v. *Arnold*, Dick. 645.

(*g*) *Ashburner* v. *M'Guire*, 2 Bro. C. C. 110.

(*h*) *Morse* v. *Morse*, 1 Bro. C. C. 128; *Heseltine* v. *Heseltine*, 3 Madd. 277.

(*i*) *Chapman* v. *Hart*, 1 Ves. 273.

(*k*) *Wetherby* v. *Dixon*, Coop. 281.

## CHAP. III.

## *Of Lapse.*

IN case a sole legatee, or one of several legatees in common, whether of a general, specific, or residuary fund (*a*), dies in the lifetime of the testator (*b*), the benefit intended him by the will lapses, and again forms part of the testator's residuary personal estate. The same doctrine prevails, notwithstanding the gift be to *A*, his executors, administrators, and assigns (*c*); or to *A*, or her proper representatives; or to *A*, to be paid to her or her heirs, one year after the testator's decease (*d*); or though given on an event which happened in the testator's lifetime (*e*); and notwithstanding the testator had

(*a*) *Skrymsker* v. *Northcote*, 1 Swanst. 571.

(*b*) *Androvin* v. *Poilblanc*, 3 Atk. 298; *Bagwell* v. *Dry*, 1 P. W. 700; *Page* v. *Page*, 2 P. W. 488; *Willing* v. *Baine*, 3 P. W. 114; *Miller* v. *Fawre*, 1 Ves. 85; *Martin* v. *Wilson*, 3 Bro. C. C. 324; *Doe* v. *Brabant*, 3 Bro. C. C. 395; *Brown* v. *Clarke*, 3 Ves. 168.

(*c*) *Elliot* v. *Davenport*, 1 P. W. 85; *Beck* v. *Rigden*, Plow. 340.

(*d*) *Corbyn* v. *French*, 4 Ves. 418, 435; *Tidwell* v. *Ariel*, 3 Madd. 403.

(*e*) *Humberstone* v. *Stanton*, 1 Ves. & B. 385.

express knowledge of the legatee's death (*f*). If a lapse is wished to be avoided, a special provision should be made for this purpose (*g*); but to prevent this consequence of lapse, the intention must be perfectly clear (*h*). The same rule applies to an appointee of a money fund, who dies in the testator's lifetime, where the appointment is made by a will; because the will speaks only from the testator's death, and is revocable till then (*i*). So where a bequest was to *A.* at twenty-one, and in case of his death under twenty-one, to *A.*'s children; *A.* attained twenty-one, and died in the lifetime of the testator, and it was decided the legacy lapsed (*k*); because had *A.* survived the testator, he would have been absolutely entitled, since it would have been impossible for the event on which the legacy was given over to happen. So a bequest to *A*, on condition she gives part of such legacy to her children, likewise lapses by the death of

(*f*) *Hewit* v. *Wright*, 1 Bro. C. C. 85.

(*g*) *Elliot* v. *Davenport*, *supra*; *Daniel* v. *Molesworth*, 2 Vern. 378; *Northey* v. *Burbage*, 1 P. W. 340; *Sibthorpe* v. *Moxom*, 3 Atk. 582; *Sibley* v. *Cook*, 3 Atk. 572.

(*h*) *Thelusson* v. *Woodford*, 4 Ves. 438; S. C. 11 Ib. 112.

(*i*) *Oke* v. *Heath*, 1 Ves. S. 139; *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. S. 9; *Vanderzee* v. *Aclom*, 4 Ves. 786.

(*k*) *Doe* v. *Brabant*, 3 Bro. C. C. 395; *Humberstone* v. *Stanton*, 1 Ves. & B. 385.

*A.* in the testator's lifetime (*l*). But where a bequest was made to *A*, on condition he paid an annuity to *B*, notwithstanding the death of *A*, the legatee, in the testator's lifetime, the annuity was supported, and decreed to be paid out of the residue, though the legacy itself lapsed (*m*). The two foregoing cases may be thus reconciled: in the former, *A.* had an option of giving any part of her legacy to her children, and until she gave a part, her children could not claim any thing out of it; therefore this is not such a trust as courts of equity can enforce: in the latter case, the bequest was on condition that *A*, the legatee, paid a certain annuity to *B.*; and this case comes under the jurisdiction of equity, because the fund, the person, and the quantity given, are ascertained (*n*): and we have seen, that a legacy shall not fail by the death of a trustee, but will be supported, in a court of equity, for the benefit of the cestui que trust (*o*). A legacy which has lapsed, may, from the intention, be revived by the birth of a legatee, answering the description in the

(*l*) *Berkhead* v. *Coward*, 2 Vern. 116.

(*m*) *Oke* v. *Heath*, 1 Ves. 141.

(*n*) See Chap. *ante*, *Legatees Trustees.*

(*o*) *Moggridge* v. *Thackerell*, 1 Ves. S. 475; 4 Ves. 418; *Earl of Inchinquin* v. *French*, 1 Cox, 1.

will, and by a republication of the will (*p*). Where a testatrix forgave her son-in-law a debt, and directed her executors to deliver to him his bond cancelled, it was held the debt was extinguished, notwithstanding the son-in-law died in the life of his mother (*q*). The following distinction is made in 2 Vern. 522, "if the debt is bequeathed to a debtor, without words of release or discharge, it shall lapse by the death of the debtor in the testator's lifetime; but if to such bequest, words of release or discharge are added, the legacy shall not lapse by the death of the legatee in the testator's lifetime." The consequence of lapse, as before observed, is, that the legacy, if general, falls into the residue, and will belong to the residuary legatee, if any (*r*); and if none, then to the testator's executors (*s*); unless they are converted into trustees for the benefit of the next of kin (*t*); which they may be, by

(*p*) *Perkins* v. *Micklethwaite*, 1 P. W. 274; *sed vide Strode* v. *Perryer*, 2 Mod. 313; 1 Eq. Cas. Abr. 407.

(*q*) *Sibthorpe* v. *Moxom*, 3 Atk. 579; S. C. 1 Ves. S. 50; *Elliot* v. *Davenport*, 2 Vern. 522; S. C. 1 P. W. 83; 1 Ves. 49; *vide Toplis* v. *Baker*, 2 Cox, 120; *Maitland* v. *Adair*, 3 Ves. 232.

(*r*) *Cambridge* v. *Rous*, 8 Ves. 25; 15 Ves. 415.

(*s*) *Owen* v. *Owen*, 1 Atk. 495; *Bagwell* v. *Dry*, 1 P. W. 700; *Southcot* v. *Watson*, 1 Atk. 227.

(*t*) *Owen* v. *Owen*, 1 Atk. 496; *Bagwell* v. *Dry*, 1 P. W. 700; *Smith* v. *Petit*, 1 P. W. 9; *Androvin* v. *Poilblanc*, 3 Atk. 300; *Farrington* v. *Knightley*, 1 P. W. 550, & n. r.

a declaration that they shall be executors in trust only; or where equal legacies are given to them, or where there is a residuary bequest, which shows the testator did not intend his executors to take beneficially (*u*). So a specific bequest to a sole executor will exclude him from the residue (*x*); though specific legacies to one of several, or to all the executors, will not, it should seem, exclude them; *vide ante*, p. 124. In general, where a bequest is given which fails, the executor shall be a trustee (*y*); and the next of kin are not excluded from taking their share in such residue, by reason of being legatees (*z*); nor is a child, forfeiting her legacy, deprived of her interest in a residue, as one of the next of kin (*a*). If the residue be given to persons as tenants in common, then as to that portion of which there is a lapse, the next of kin will be entitled, and not the remaining residuary legatees; if they took as joint-tenants, the bequest would survive (*b*). It may

(*u*) *Owen* v. *Owen*, *ante*, 243; *Beard* v. *Beard*, 3 Atk. 71.

(*x*) *Southcot* v. *Watson*, 3 Atk. 226; *Smith* v. *Petit*, 1 P. W. 7, n. 1; *Farrington* v. *Knightley*, 1 P. W. 550, n. 1; *Blinkhorne* v. *Feast*, 2 Ves. S. 29.

(*y*) *Dawson* v. *Clarke*, 18 Ves. 255.

(*z*) *Attorney-General* v. *Parkins*, Ambl. 566; *Cordel* v. *Noden*, 1 Vern. 148.

(*a*) *Hemming* v. *Mackley*, 1 Bro. C. C. 304.

(*b*) *Skrymsher* v. *Northcote*, 1 Swanst. 571.

be observed, that an intestate's personal property follows the person, and is distributable according to the laws of the country where such intestate resided prior to his decease (c). In *Somerville* v. *Lord Somerville*, 5 Ves. 787, it is said, "The succession to personal property of an intestate, is regulated by the law of the country in which he was a domiciled inhabitant at the time of his death, without any regard either to the place of his death or his birth, or the situation of his property at the time of his death. So a man can have but one domicil for the purpose of succession." It was further said, "The original domicil, or a domicil arising from a man's birth and connections, is to prevail, until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil, and taking another as his sole domicil." It may be further remarked, that no domicil can be obtained till a person is sui juris.

(c) *Pipon* v. *Pipon*, Ambl. 25.

## CHAP. IV.

## *Of Satisfaction.*

SATISFACTION is a doctrine governed entirely by intention (*a*); therefore where a person gives in his lifetime, that which he meant to dispose of, through the medium of his executors, after his death, viz. by his will, such gift shall be, presumably, a satisfaction of his intention, either in toto or pro tanto: such presumption may, however, be rebutted by evidence (*b*), or by circumstances, in this case; as also where a bequest is presumed to be a satisfaction of a demand against the testator. The doctrine of admitting evidence to rebut the presumption of law, ought not, however, it is said, to be extended (*c*). A legacy, to be a satisfaction of a debt, must

(*a*) *Deacon* v. *Smith*, 3 Atk. 326; *Matthews* v. *Matthews*, 2 Ves. S. 637; *Thellusson* v. *Woodford*, 4 Madd. 420; *Cookson* v. *Ellison*, 2 Cox, 220.

(*b*) *Mascal* v. *Mascal*, 1 Ves. S. 324; *Ellison* v. *Cookson*, 1 Ves. J. 107; S. C. 3 Bro. C. C. 63; *Baugh* v. *Reed*, 1 Ves. 257; *Pullen* v. *Cresy*, 3 Anstr. 833; *Hume* v. *Edwards*, 3 Atk. 450; *Bell* v. *Coleman*, 5 Madd. 23; *Monck* v. *Monck*, 1 Ball. & B. 302.

(*c*) *Graves* v. *Boyle*, 1 Atk. 509; see Chap. *Parol Evidence.*

be given by the same person from whom the debt is due (*d*); and generally, and not for any particular or specified cause (*e*); it must likewise be of the same nature (*f*), equal or greater in amount, equally beneficial in point of continuance and commencement, and payable at a period as advantageous to the legatee as the debt (*g*). Therefore a devise of land cannot be a satisfaction of a sum of money due to the legatee from the testator. Not even where there was a power given by the testator, (the debtor,) to the trustees of his will, to act in every thing for the best advantage of the testator's daughters, the legatees, and creditors; and the trustees converted the land into money; since a satisfaction, if such, must be so at the testator's death (*h*). Nor can a bequest of money be a satisfaction of a covenant to settle land (*i*). Under the foregoing circumstances,

(*d*) *Compton* v. *Sale*, 2 P. W. 555.

(*e*) *Lee* v. *Brown*, 4 Ves. 362; *Baugh* v. *Reed*, 3 Bro. C. C. 192; *Chancey's Case*, 1 P. W. 408.

(*f*) *Eastwood* v. *Vincke*, 2 P. W. 617; *Sir George Chidley* v. *Lee*, Prec. Chan. 228.

(*g*) *Haynes* v. *Mico*, 1 Bro. C. C. 132; *Matthews* v. *Matthews*, 2 Ves. S. 637; *Blandy* v. *Widmore*, 1 P. W. 324; *Jeacock* v. *Faulkner*, 1 Bro. C. C. 295.

(*h*) *Chaplin* v. *Chaplin*, 3 P. W. 248.

(*i*) *Eastwood* v. *Vincke*, 2 P. W. 617; S. P. 2 Ves. 37; *Goodfellow* v. *Burchett*, cited *Lechmere* v. *Lord Carlisle*, 3 P. W. 227; *Chaplin* v. *Chaplin*, 3 P. W. 247.

a person entitled as next of kin to the intestate, may be satisfied by his distributive share of a sum, claimed as due to him, by the covenant of the intestate (*k*); the share or distribution being considered a performance of the covenant of the intestate: though according to *Alleyn* v. *Alleyn*, 2 Ves. 38, a bequest of a residue, after payment of debts, was not held a satisfaction of a sum, to which the legatee was entitled by the testator's marriage settlement, from the uncertainty of the amount of such residue. Again, in *Foresight* v. *Grant*, 1 Ves. J. 298, a general residuary devise and bequest to a wife for life, was not held a satisfaction of a life estate, settled on her by her marriage settlement, from the general uncertainty of the value of a residue, being that only which remains after all payments made (*l*). The dictum, that the time not being equally beneficial, the legacy shall still be considered a satisfaction, must, it is apprehended, be considered as over-ruled (*m*): and a bond has

(*k*) *Richardson* v. *Elphinstone*, 2 Ves. J. 464; *Chaplin* v. *Chaplin*, 3 P. W. 247; *Wathen* v. *Smith*, 4 Madd. 327; *Garthshore* v. *Chalic*, 10 Ves. 1, where all the preceding cases are enumerated by Lord Eldon.

(*l*) *Freemantle* v. *Banks*, 5 Ves. 79; *Garthshore* v. *Chalic*, 10 Ves. 1, *et seq.*

(*m*) *Lee* v. *Cox*, 3 Atk. 419; *Richman* v. *Morgan*, 2 Bro. C. C. 396.

been held unsatisfied, by a bequest of a legacy to a much greater amount than the sum secured by the bond, because payable at a different and more distant time (*n*). A bequest under a will is, if equally advantageous, a satisfaction in toto, or pro tanto, of portions due to children under the testator's marriage settlement (*o*); or of debts due from him to his children as a trustee for them (*p*). In *Sparkes* v. *Cater*, 3 Ves. 535, portions were held satisfied by legacies of greater amount, though the legacies were covenanted to be paid three months after the portions were to have been paid by the settlement; and in cases between parent and child, small circumstances are not sufficient to repel the presumption of satisfaction: but, in other cases, the courts will lay hold of any circumstances, to take the case out of the rule of presumed satisfaction (*q*). In *Tolson* v. *Collins*, 4 Ves. 491, however, it is said, "a legacy by a parent to a child is not

(*n*) *Jeacock* v. *Faulkner*, 1 Bro. C. C. 297; see also *Thellusson* v. *Woodford*, 4 Madd. 420; *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 526.

(*o*) *Warren* v. *Warren*, 1 Bro. C. C. 305; 2 Ib. 352, 529; *Thellusson* v. *Woodford*, 4 Madd. 420; *Rigman* v. *Morgan*, 2 Bro. C. C. 64; *Moulson* v. *Moulson*, 1 Bro. C. C. 83; *Ellison* v. *Cookson*, 1 Ves. J. 107; S. C. 3 Bro. C. C. 63.

(*p*) *M'Donal* v. *Halfpenny*, 2 Vern. 484; 2 Atk. 521.

(*q*) *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 529; *Carr* v. *Eastbrooke*, 3 Ves. 564.

any satisfaction of a debt due from such parent to his child, unless, from the will, or the circumstances as to the manner in which the testator acted in the property, it can be plainly proved he so intended it." But Lord Eldon, in *Pole* v. *Lord Somers*, 6 Ves. 319, thus states the law, "A parent must be taken to have intended to satisfy the claim of his children to whom he was indebted, if his will contain such provisions as this court will hold a satisfaction of a debt from a parent to a child, and slight circumstances will not alter this presumption between father and child (*r*)." It has also been said, double portions are discountenanced, and small circumstances will raise an inference against double portions (*s*): in which last case there was a devise of real estate, charged with the payment of 10,000*l.* to the testator's son *A*, and with the like sum to each of the testator's younger children, payable as to daughters at twenty-one or marriage; some time after the date of testator's will, he had a daughter, and by a codicil, he revoked the legacy given to *A*, and gave that legacy to such daughter; and it was held, that the

(*r*) See also 9 Ves. 427; *Savage* v. *Carrol*, 1 Ball. & B. 276.

(*s*) *Osborne* v. *Duke of Leeds*, 5 Ves. 384.

legacy given by the codicil was a satisfaction of the legacy given to her by the will as a younger child. A legacy vested, is not satisfied by another legacy of much greater value, if given at a more distant period, or on a contingency (*t*). A legacy, though it may be a satisfaction of a debt, if given under the circumstances above mentioned (*u*), even though the wife be the creditor, and for her separate estate (*x*), yet if there is a general devise for payment of debts, the presumption of satisfaction is rebutted (*y*); and if a legacy be less than the debt, it is not a satisfaction, even pro tanto (*z*). Legacies are not considered to be given in satisfaction of servants wages (*a*); and this doctrine may be supported by the cases subsequently alluded to, proving that legacies are not any satisfaction for debts, contracted subsequent to the testator's will. It has also

(*t*) *Pullen* v. *Cresy*, 3 Anstr. 833.

(*u*) *Graham* v. *Graham*, 1 Ves. 262; 9 Mod. 438; *Jeffs* v. *Wood*, 2 P. W. 132; *Cheney's Case*, 2 P. W. 408; *Cuthbert* v. *Peacock*, cited 3 P. W. 227; *Reeck* v. *Kenegal*, 1 Ves. S. 126; *Richardson* v. *Greece*, 3 Atk. 67; *Clark* v. *Sewell*, 3 Atk. 97.

(*x*) *Fowler* v. *Fowler*, 3 P. W. 355.

(*y*) *Richardson* v. *Greece*, 3 Atk. 68; *Cheney's Case*, 1 P. W. 411; *Clarke* v. *Guise*, 2 Ves. 618; *Whitfield* v. *Clement*, 1 Meriv. 402.

(*z*) *Eastwood* v. *Vicke*, 2 P. W. 616.

(*a*) *Richardson* v. *Greece*, *ante*.

been said, a testator shall, if capable, be considered both just and bountiful (*b*); but subsequent cases have over-ruled this doctrine. Where a legacy is a satisfaction of a debt, interest will be payable from the death of the testator (*c*).

A bequest can never be deemed a satisfaction of a debt contracted subsequent to the date of the will (*d*), because the doctrine is founded on presumption, and it would be absurd to suppose a man intended, by a gift in præsenti, to satisfy a debt to be hereafter contracted. Therefore, a legacy cannot be a satisfaction of a negotiable bill (*e*), because it is transferrible from hand to hand, besides the testator cannot know who will be his creditor. It is also observable, that a legacy is not a satisfaction of a running account, from the uncertainty whether a debt will exist or not; and this case falls under the doctrine of debts, it is apprehended, contracted after making the testator's will, since the debt is not due until the account is settled, which

(*b*) *Cranmer's Case*, Salk. 155, 508.

(*c*) *Clarke* v. *Sewell*, 3 Atk. 97.

(*d*) *Thomas* v. *Bennet*, 2 P. W. 243; *Cranmer's Case*, 1 Salk. 508; *Fowler* v. *Fowler*, 3 P. W. 355; *Cranmer's Case*, 2 Salk. 208, is *contra*, but this case is over-ruled, 1 Bro. 130.

(*e*) *Carr* v. *Eastabrooke*, 3 Ves. J. 564.

can be done only by the executor after the testator's death (*f*). Legacies or gifts, by different instruments, may be accumulative (*g*), unless given expressly for the same purpose or cause (*h*); and even an advancement may stand with a legacy of the same amount, where so intended by the testator (*i*).

We have seen of what a legacy may be a satisfaction: it will next be shown that a legacy may be satisfied. A legacy may be adeemed or satisfied by an advancement by the testator in his lifetime, either on the marriage (*k*), or subsequent to the marriage of a legitimate child (*l*). However, an advancement to a child on marriage, does not deprive that child of the share of the residue bequeathed by a will dated antecedently to such advancement, from the uncertainty of the amount of

(*f*) *Ante*, p. 37.

(*g*) *Masters* v. *Masters*, 2 P. W. 224.

(*h*) *Duke of St. Alban's* v. *Beauclerk*, 2 Atk. 640; *Finch* v. *Finch*, 1 Ves. J. 540.

(*i*) *Miller* v. *Miller*, 3 P. W. 358.

(*k*) *Ballasis* v. *Ushwart*, 1 Atk. 427; *Thellusson* v. *Woodford*, 4 Madd. 420; *Dwyer* v. *Lysaght*, 1 Ball. & B. 167; 2 Bro. C. C. 55; *Ellison* v. *Cookson*, 3 Bro. C. C. 63; *Rawlins* v. *Powell*, 1 P. W. 299; 1 Ball. & B. 302; *Bell* v. *Coleman*, 5 Madd. 24.

(*l*) *Powell* v. *Cleaver*, 2 Bro. C. C. 499; 18 Ves. 153.

the residue (*m*). An advancement by any but a parent, or a person in loco parentis, is not, however, any satisfaction of a legacy (*n*). A brother may stand in loco parentis (*o*); but a putative father (*p*), or an uncle, or grandfather (*q*), during the life of the father, is not considered in the light or character of a parent (*r*). Where *A.* agreed to settle 100*l.* a year on his intended wife, and being ill, he bequeathed that sum to her; and subsequently, by a settlement previous to his marriage with her, he settled 100*l.* a year on her, it was held that the settlement was a satisfaction of the bequest (*s*). So if a man, by will, gives to any woman he may marry, 2,000*l.* a year, and after marriage, by codicil, gives a legacy of that amount to his wife, it shall be intended to be a satisfaction (*t*). It is, however, observable, that if a sum be raised by an executor under a power, and

(*m*) *Freemantle* v. *Bankes*, 5 Ves. 85.

(*n*) *Debeze* v. *Mason*, 2 Bro. C. C. 520.

(*o*) Barnadist. 153; 2 Bro. C. C. 352, 530; *Monck* v. *Monck*, 1 Ball. & B. 298.

(*p*) *Debeze* v. *Mason*, *supra*; Swinb. 36; *Powell* v. *Cleaver*, 2 Bro. C. C. 500; *Smith* v. *Strong*, 4 Bro. C. C. 494.

(*q*) *Roome* v. *Roome*, 3 Atk. 183.

(*r*) *Brown* v. *Pecks*, 1 Eden, 140.

(*s*) *Mascal* v. *Mascal*, 1 Ves. S. 324.

(*t*) *Osborne* v. *Duke of Leeds*, 5 Ves. 369.

advanced to a child, it can never be a satisfaction of a legacy given by the person exercising the power, because the portions come from different persons (*u*). So a bequest by a widow, the executrix of her husband, to the same person and to the same amount as a bequest given by her husband's will, and though for a longer duration, was not held a satisfaction (*x*), being from different persons. But where *A*, a father, the trustee for his daughter, advanced a greater sum on the marriage of his daughter than that he held as her trustee, it was held to be a satisfaction of the debt due from him as trustee. Again, a gift must be equally advantageous, to be a satisfaction of a legacy; therefore, money secured to be paid on a contingency, does not amount to a satisfaction of an absolute legacy (*y*). An advancement must also be for the same purpose for which the legacy was intended (*z*), and of the same kind, to be a satisfaction; (*a*); therefore, an advancement does not satisfy a

(*u*) *Seed* v. *Bradford*, 1 Ves. 502.

(*x*) *Compton* v. *Sale*, 2 P. W. 555; *Lee* v. *Brown*, 4 Ves. 366.

(*y*) *Clarke* v. *Sewell*, 3 Atk. 98.

(*z*) *Roome* v. *Roome*, 3 Atk. 183; *Bell* v. *Coleman*, 5 Madd. 24.

(*a*) *Masters* v. *Masters*, 1 P. W. 427; *Compton* v. *Sale*, 2 P. W. 555.

bequest of a residue, from the uncertainty of the amount intended the legatee by such a bequest (*b*). Again, an advancement to a husband, who gave a receipt for the money advanced, as part of his wife's portion, was not held to be a satisfaction of a legacy that was limited differently by the will of the person making the advancement (*c*). So a legacy is not satisfied by the legatee being taken into partnership by the testator, subsequent to the date of the will (*d*); nor by the gift of a beneficial lease (*e*); nor is a money legacy satisfied by the gift of an annuity (*f*); neither is the bequest of a residue to *A*, for whom the testator is a trustee for an annuity under a will, a satisfaction of the annuity (*g*). An advancement to exactly the same amount as a legacy, was not held a satisfaction of the legacy, the intention of the testator being disclosed by his declaring, on the delivery of such advancement, that he had not done enough for his wife (*h*). But where there was a bequest of 400*l.* to

(*b*) *Freemantle* v. *Bankes*, 5 Ves. 79.

(*c*) *Bell* v. *Coleman*, 5 Mad. 23.

(*d*) *Holmes* v. *Holmes*, 1 Bro. C. C. 384.

(*e*) *Grave* v. *Salisbury*, 1 Bro. C. C. 425.

(*f*) *Masters* v. *Masters*, 1 P. W. 432; *Compton* v. *Sale*, 2 Ib. 555.

(*g*) *Barret* v. *Beckford*, 1 Ves. 520.

(*h*) *Miller* v. *Miller*, 3 P. W. 358.

build in a particular place, and for a particular purpose, and the testator, in his lifetime, expended more than 400*l.* in building in the specified place, and for the object pointed out by the will, it was held to be a satisfaction (*i*).

## CHAP. V.

## *Of Waiver.*

A LEGACY may become ineffectual by the waiver of the legatee (*a*), and his refusal to accept the benefit intended him by the testator.

(*i*) *Husbands* v. *Husbands*, 1 Vern. 95.

(*a*) P. Shep. Touch. 452; Com. Dig. Baron & Feme [R.]

## CHAP. VI.

## *Of Election.*

It is a rule of courts of law and equity, that every legatee claiming under a will must give effect to the will: if any interest, therefore, to which the legatee is entitled, is given away by the will under which he claims, he is put to his election; but then the intention of the testator must be plain and manifest (*a*); and the property intended to be disposed of must be described with certainty (*b*). This doctrine is merely personal, and binds the interest of the person only who claims in opposition to the will, and does not extend to the legatee's children, or other persons, who take no interest under the will. Thus, where *A.* was entitled under the settlement of *B*, and *B.* bequeathed a legacy to *A.* for her life, with a limitation over in favour of her children; notwithstanding the testator declared the provision by his will

(*a*) *Rancliffe* v. *Parkins*, 6 Dow. Parl. Cas. 179; *Blake* v. *Bunbury*, 1 Ves. J. 523; *Finch* v. *Finch*, 1 Ves. J. 543.

(*b*) *Druce* v. *Denison*, 6 Ves. 399.

should be a bar to any claim under the settlement, it was held to extend only to the life estate of *A*, and not to the ulterior limitation in favour of her children (*c*). And election and satisfaction differ in this respect,—to raise a case of election, the testator must dispose of that to which he has not a title (*d*); whereas satisfaction is implied, as in the cases mentioned in the last chapter, where the testator disposes of his own property (*e*). The consequence of a bequest to a married woman, by her husband, may, in some cases, put her to her election: and this doctrine, which prevails in equity (*f*), and also at law (*g*), takes place where a woman, being entitled to dower or a jointure, is likewise a legatee under her husband's will, and claims her legacy and her dower or jointure, in opposition to the express words of the will (*h*). It was formerly held, that where a widow claimed dower out of an estate, from which she was likewise reaping a general benefit, as the only fund for answering

(*c*) *Ward* v. *Baugh*, 4 Ves. 627.

(*d*) *Rancliffe* v. *Parkins*, 1 Dow. Parl. Cas. 149, 180.

(*e*) *Druce* v. *Denison*, 6 Ves. 399.

(*f*) *Lawrence* v. *Lawrence*, cited 2 Ves. J. 578.

(*g*) *Birmingham* v. *Kernan*, 2 Sch. & Lef. 450; *Grafton* v. *Harwood*, *vide* 1 Swanst. 425; *Dillon* v. *Parker*, 1 Swanst. 359.

(*h*) *Baynton* v. *Baynton*, 1 Bro. C. C. 444; *Pearson* v. *Pearson*, 1 Bro. C. C. 291.

that bequest, under the will of her husband; as where a rent-charge was given, and charged solely on the lands of which she was dowable (*i*), it would put her to her election; but this doctrine has been since disapproved (*k*) and over-ruled (*l*). A general bequest of an annuity to a wife (*m*) is not, nor is a general residuary bequest, any bar to her title of dower (*n*): nor is she barred of her dower, where land, of which she is dowable, and other property, is chargeable with such annuity (*o*); in short, the two claims, if not inconsistent, may well exist together. It is said (*p*), to exclude a wife from taking under the will of her husband, and likewise her dower, there must appear an intention to exclude her (*q*). A devise of estates to be sold, and an annuity to be paid out of the produce of the real and

(*i*) *Villareal* v. *Lord Galway*, Ambl. 682.

(*k*) *French* v. *Davis*, 2 Ves. J. 578; *Jones* v. *Collier*, Ambl. 730; *Arnold* v. *Kempstead*, Ambl. 466; *Wake* v. *Wake*, 3 Bro. C. C. 254; *sed vide Strakam* v. *Sutton*, 3 Ves. 250.

(*l*) *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 453; *Gretton* v. *Harwood*, 1 Swanst. 425.

(*m*) *Middleton* v. *Cater*, 4 Bro. C. C. 409; *Forster* v. *Cook*, 3 Bro. C. C. 350.

(*n*) *Ayres* v. *Willis*, 1 Ves. 231.

(*o*) *Pitts* v. *Snowdon*, note to 1 Bro. C. C. 291; *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 453.

(*p*) *French* v. *Davis*, 2 Ves. J. 578; *Greatorex* v. *Cary*, 6 Ves. 616.

(*q*) *French* v. *Davis*, 2 Ves. J. 577; *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 452; *Babington* v. *Greenwood*, 1 P. W. 533.

personal estates to the wife, is not sufficient to exclude her, because there is not any repugnance in the sale of the estate, and of her title to dower (*r*). A widow may likewise be put to her election, between the benefit to be derived from a will, and the settlement made on her marriage; and notwithstanding the will be void as to the devise of the realty (*s*): but time shall be allowed the widow to ascertain which fund is most beneficial for her to take (*t*); therefore she may file a bill to have the debts and legacies paid, and the funds clearly ascertained (*u*). It is observable, that election extends to all interests of the person electing under the will (*v*); but an election made under a mistaken impression, will not be binding on a widow in equity (*x*). A bequest to a wife, in bar and satisfaction of dower and thirds, does not, however, exclude her title or right as next of kin (*y*). An heir-at-law may be bound to

(*r*) *French* v. *Davis*, 2 Ves. J. 577; *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 452; *Babington* v. *Greenwood*, 1 P. W. 533.

(*s*) *Newman* v. *Newman*, 1 Bro. C. C. 186.

(*t*) *Wake* v. *Wake*, 2 Ves. 337; *Chalmers* v. *Storil*, 2 Ves. & B. 223.

(*u*) *Chalmers* v. *Storil*, 2 Ves. & B. 222.

(*v*) *Boynton* v. *Boynton*, 1 Bro. C. C. 445; 4 Ves. 623; *Welby* v. *Welby*, 2 Ves. & B. 191.

(*x*) *Kidney* v. *Coussmaker*, 12 Ves. 153.

(*y*) *Pickering* v. *Lord Stamford*, 3 Ves. 337; ib. 493.

elect, where a legacy is given to him on condition not to dispute the will under which he claims his legacy, and there is also a devise of real estate, and the will is not duly executed; but in this case the heir, being an infant, was allowed till he came of age to elect (*z*). Unless such condition be annexed, the heir will be entitled both to his legacy and his estate (*a*): and an heir may be bound wherever the intention is clear to exclude him, and the two claims are inconsistent (*b*). But a legacy to a child, entitled to a rent-charge out of an estate devised by the same will, will not put him to his election, since the rent-charge does not defeat the devise (*c*). Issue in tail may be put to their election, by reason of the entailed estate being devised, where such issue are devisees of a fee-simple or other estate, or legatees under the will disposing of the estate to which they are entitled in tail (*d*). So children may be obliged to elect, between interests given them by will, and benefits to which they are entitled

(*z*) *Boughton* v. *Boughton*, 2 Ves. 15.

(*a*) *Hearle* v. *Greenbank*, 1 Ves. S. 307; S. C. 3 Atk. 695; *Ex parte Ilchester*, 7 Ves. 375.

(*b*) *Blake* v. *Bunbury*, 1 Ves. J. 523; *Finch* v. *Finch*, 1 Ves. J. 543.

(*c*) *Ayres* v. *Willis*, 1 Ves. 231.

(*d*) *Noys* v. *Mordaunt*, 2 Vern. 500; *Streatfield* v. *Streatfield*, Forrest, 176.

by settlement, when both claims are inconsistent (*e*). So a legatee, being a bond or other creditor, may be put to his election, by a bequest inconsistent with the claim of his debt, which election, when made, will entirely confine his interest to the fund he shall elect (*f*). Where a testator, however, bequeathed his property in trust to sell and pay debts (*g*), and then to pay 300*l*., which *A*. the testator, stated he owed *B*. on bond, and 50*l*. as a legacy; it was held, that *B*. should receive the whole 300*l*. and the legacy, notwithstanding the testator only owed him 120*l*. on the bond, from the inconsistency arising by the direction to pay to *B*. the bond, &c. after a bequest for the express purpose of paying all debts (*h*). Election is not enforced in favour of a residuary legatee (*i*), because he is entitled to the residue only after all claims are satisfied. Where the funds are originally clear, and the party has for a length of time taken under the will, this shall be held to be an election, especially where a bill has been filed to have a transfer of stock

(*e*) *Whistler* v. *Webster*, 2 Ves. J. 267.

(*f*) *Graves* v. *Boyle*, 1 Atk. 509.

(*g*) *Richardson* v. *Greece*, 3 Atk. 68; *Cheney's Case*, 1 P. W. 411; *Clarke* v. *Guise*, 2 Ves. 618.

(*h*) *Whitfield* v. *Clemment*, 1 Meriv. 402.

(*i*) *Lord Darlington* v. *Pulteney*, 3 Ves. 385.

by the legatee (*k*); but, as before observed, equity would relieve, if an election had been made through a mistake or misrepresentation of the funds (*l*). Election is a doctrine inapplicable as to the funds out of which debts are to be paid; they are payable, primary, out of the personal estate, and subsequently, resort may be had by the creditors to any property charged with the payment of debts (*m*).

(*k*) *Butrick* v. *Broadhurst*, 3 Bro. C. C. 88.

(*l*) See *Dillon* v. *Parker*, 1 Swanst. 383, n.

(*m*) *Ibid.*; *Kidney* v. *Coussmaker*, 12 Ves. 154.

## CHAP. VII.

## *Of Abatement.*

AND lastly, we come to Abatement, and it may be stated as a general rule, that on a deficiency of assets to pay debts, all legatees, both general and specific, must abate (*a*); preference being given to specific legatees in this respect, that the general fund, out of which general legatees are payable, must first bear the burthen (*b*). No preference is given either to executors (*c*), or to servants (*d*), or to annuitants (*e*), being general legatees; nor does a direction for time of payment alter this consequence of law (*f*).

(*a*) *Sleech* v. *Thorington*, 2 Ves. S. 563; *Bishop of Peterborough* v. *Mortlock*, 1 Bro. C. C. 566; *Ashley* v. *Pocock*, 3 Atk. 208; *Clark* v. *Sewell*, ib. 99; *Clifton* v. *Burt*, 1 P. W. 679; *Long* v. *Short*, 1 P. W. 403; *Topping* v. *Topping*, 1 P. W. 730; *Brown* v. *Allen*, 1 Vern. 31.

(*b*) *Masters* v. *Masters*, 1 P. W. 423; *Hinton* v. *Pinke*, 1 P. W. 540.

(*c*) *Tate* v. *Austin*, 1 P. W. 265; *Hume* v. *Edward*, 3 Atk. 693; *Rogers* v. *Mellicot*, Dick. 570.

(*d*) *Attorney-General* v. *Robins*, 2 P. W. 25; Cas. T. Hardw. 206, *contra*.

(*e*) *Hume* v. *Edward*, 3 Atk. 693; *Barton* v. *Cooke*, 5 Ves. 464.

(*f*) *Lewin* v. *Lewin*, 2 Ves. S. 415; *Blower* v. *Morrel*, 2 Ves. 421; *Burridge* v. *Bradyl*, 1 P. W. 127; *Beeston* v. *Booth*, 4 Madd. 170.

Priority may, however, be expressly given (*g*); as where a testator directed, in case of deficiency of assets, legacies, given to his sons, should answer a bequest to his daughter; on a devastavit by an executor, it was held the sons should bear the loss. So priority may be given, by pointing to a particular fund for payment (*h*). Legacies to charities are subject in our law to the doctrine of abatement (*i*). So creditors who have released the testator from their debts, and then become legatees to the amount of their debts, must be considered as other legatees, and liable to the same consequences (*k*). Residuary legatees, in general, take what remains after answering all the testator's debts and legacies, and are not, therefore, entitled to call on general legatees, much less on specific legatees, to abate; but on the circumstances, and where the fund was contemplated by the testator as fixed in amount, a residuary legatee of a specific fund was held, for this purpose, a general legatee of

(*g*) *Marsh* v. *Evans*, 1 P. W. 668; *Attorney-General* v. *Robins*, 2 P. W. 25.

(*h*) *Acton* v. *Acton*, 1 Meriv. 178.

(*i*) *Masters* v. *Masters*, 1 P. W. 423; *Attorney-General* v. *Hudson*, 1 P. W. 675; *Attorney-General* v. *Robins*, 2 P. W. 25.

(*k*) *Coppin* v. *Coppin*, 2 P. W. 296; *Shirt* v. *Westby*, 16 Ves. 393.

this fund, and entitled to call for an abatement from the other legatees of the same fund (*l*); this doctrine has, however, been disapproved (*m*). General and specific legatees abate between themselves, according to the value of their legacies, at the end of the year from the testator's death, this being the time at which legacies are payable (*n*), unless any other time of payment be mentioned; and if a different time be appointed for payment, then the value of their respective legacies must be calculated from such time of payment (*o*). A legacy, being a debt of piety, as to build a maternal monument (*p*)—or a gift of three pounds to the poor of three several parishes—being looked on as part of the funeral expenses, and to be taken as doles (*q*), is said not to be liable to abate. So a legacy, if given to a wife unprovided for (*r*), or if given to her in satisfaction of dower, (in which cases the wife is considered

(*l*) *Dyosse* v. *Dyosse*, 1 P. W. 305; *Page* v. *Leapingwell*, 18 Ves. 463.

(*m*) *Fonereau* v. *Poyntz*, 1 Bro. C. C. 478.

(*n*) *Simmons* v. *Wallace*, 4 Bro. C. C. 349; *Hinton* v. *Pinke*, 1 P. W. 541; *Finch* v. *Inglis*, 4 Bro. 424.

(*o*) *Morris* v. *Bird*, 3 Ves. 628.

(*p*) *Masters* v. *Masters*, 1 P. W. 423.

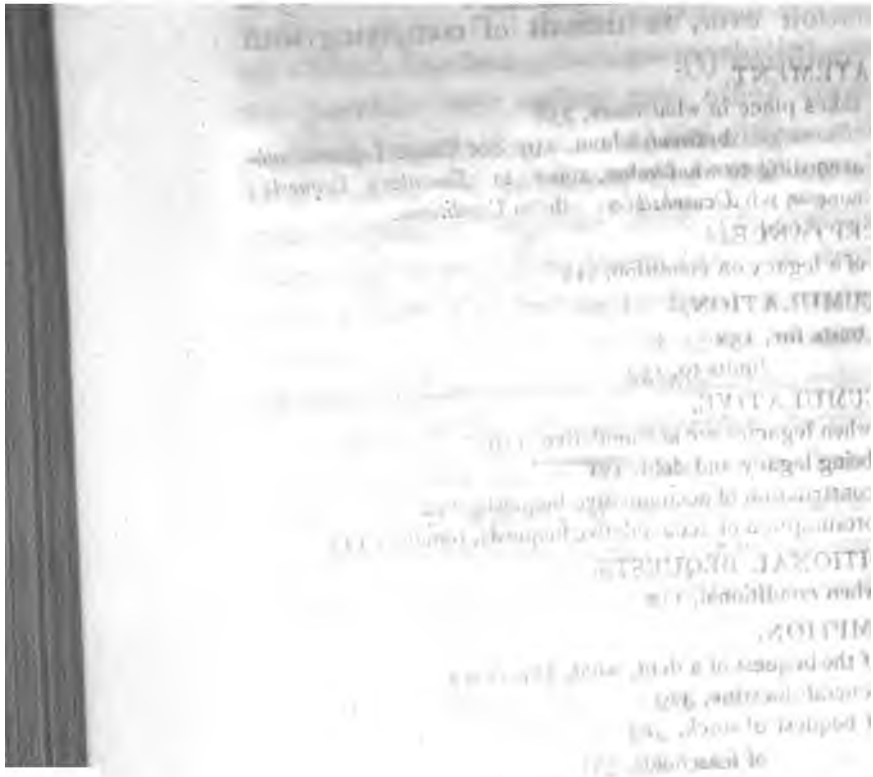
(*q*) *Attorney-General* v. *Robins*, 2 P. W. 25.

(*r*) *Lewin* v. *Lewin*, 2 Ves. 415.

a purchaser of the legacy (*s*),) is not liable to abate. Legacies vested may, as before observed, be defeated by an executory bequest, as also by the non-performance of a condition subsequent, annexed to a bequest, and by a limitation over, in default of complying with the condition (*t*).

(*s*) *Burridge* v. *Bradyl*, 1 P. W. 127; *Blower* v. *Morret*, 2 Ves. 420; *Devenhill* v. *Fletcher*, Ambl. 244.

(*t*) See Chap. *Legacies subject to Executory Bequests*; ib. to *Conditions*.



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